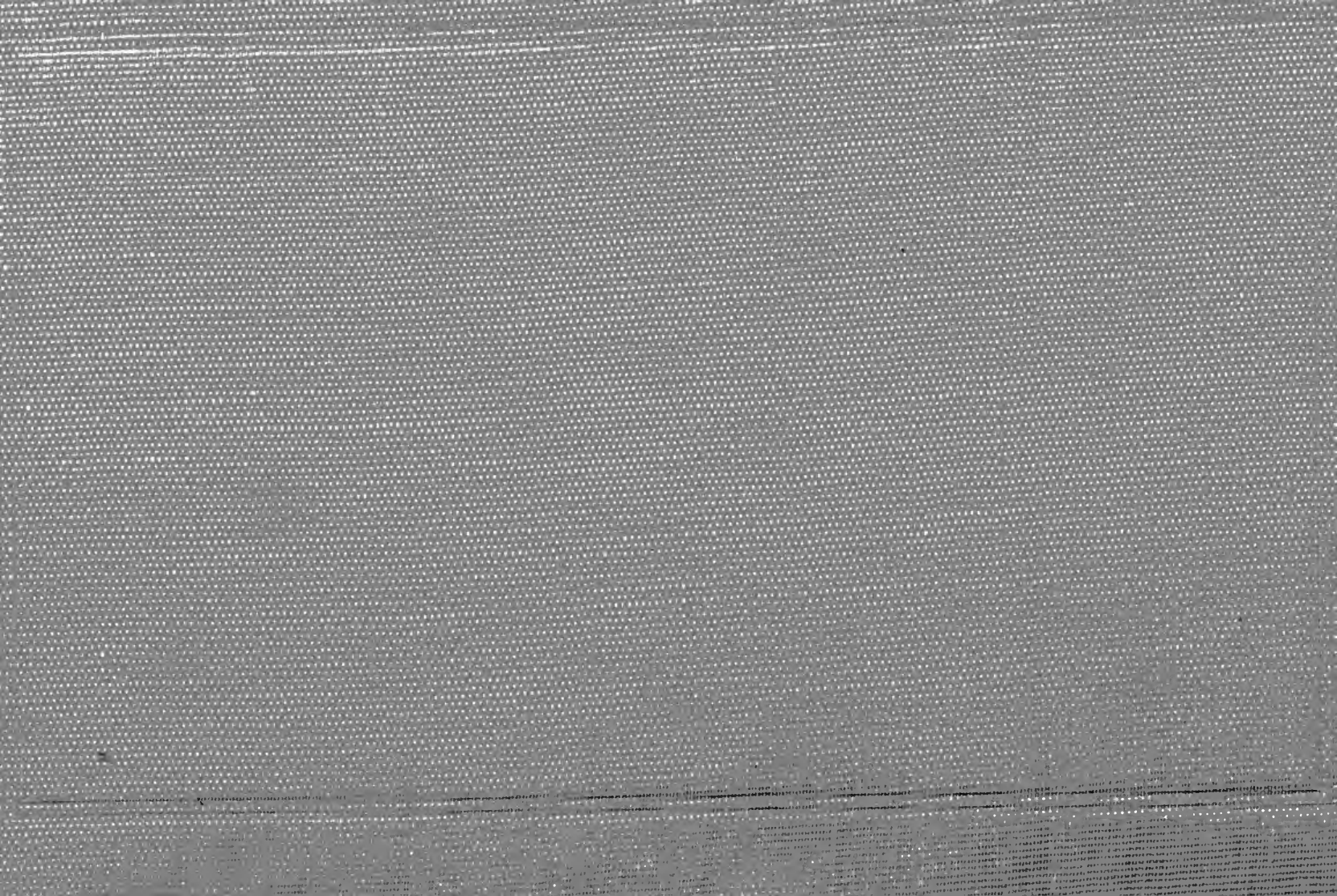

Form No. 7

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EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

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WILCOX & CO.

No. 4409

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

vs.

UNION LAND & CATTLE COMPANY, a Corporation, and W. T. SMITH, Receiver of said UNION LAND & CATTLE COMPANY, Under and by Virtue of That Certain Order Given and Made by the Above-entitled Court in the Above-entitled Action on July 28, 1920, and to J. W. DORSEY and W. E. CASHMAN,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4409

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Appellants,

vs.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Assignment of Errors..... 108

Bond on Appeal..... 114

Certificate of Clerk U. S. District Court to Transcript of Record..... 120

Citation..... 122

EXHIBITS:

Creditor's Exhibit "A"—Order Authorizing Receiver to Employ Additional Legal Assistance..... 61

Creditor's Exhibit "B"—Order Appointing Additional Counsel..... 62

Hearing on Petition for Compensation of Attorneys—Submitted..... 7

Minutes of Court—June 19, 1924—Hearing on Petition for Compensation of Attorneys—Submitted..... 7

Names and Addresses of Attorneys of Record 1

Notice of Application for Compensation of Attorneys of Union Land and Cattle Company and Special Counsel for the Receiver, and for Repayment of Costs and Expenses Advanced and Paid in Behalf of Said Union Land & Cattle Company and Its Creditors. 4

and MILTON R. CLARK, as Trustees under and by virtue of that certain Deed of Trust or Indenture dated September 1st, 1916, and executed by the Union Land & Cattle Company to said First Federal Trust Company and Milton R. Clark, as Trustees, which petition was filed herein on or about the 18th day of May, 1923,

AND

Petition of FIRST FEDERAL TRUST COMPANY and MILTON R. CLARK, as Trustees, etc. for leave to intervene and to sell properties in possession of the Receiver, which petition was filed herein on or about the 25th day of August, 1923,

AND

Petition of FIRST NATIONAL BANK OF SAN FRANCISCO, a corporation, for an order directing liquidation and sale of properties, which petition was filed herein on or about the 25th day of August, 1923,

AND

Petition of FIRST NATIONAL BANK OF CHICAGO for leave to intervene and for an order directing liquidation and sale of property, which petition was filed on or about the 31st day of August, 1923,

AND

Petition of FIRST NATIONAL BANK OF BOSTON for leave to intervene and for an order directing liquidation and sale of property, which petition was filed on or about the 31st day of August, 1923, [2]

AND

Petition of NATIONAL SHAWMUT BANK OF BOSTON for leave to intervene and for order directing liquidation and sale of property, which petition was filed herein on or about the 31st day of August, 1923,

AND

Petition of NATIONAL BANK OF COMMERCE OF NEW YORK for leave to intervene and for order directing liquidation and sale of property, which petition was filed herein on or about the 31st day of August, 1923,

AND

Petition of FIRST NATIONAL BANK OF ST. LOUIS for leave to intervene and for order directing liquidation and sale of property, which petition was filed herein on or about the 31st day of August, 1923,

AND

Petition of OLD COLONY TRUST COMPANY for leave to intervene and for order directing liquidation and sale of property, which petition was filed herein on or about the 31st day of August, 1923,

AND

Petition of NATIONAL CITY BANK for leave to intervene and for order directing liquidation and sale of property, filed herein on or about the 31st day of August, 1923,

AND

Petition of RECEIVER for authority to purchase livestock and to borrow money, which peti-

tion was filed herein on or about the 26th day of October, 1923. [3]

NOTICE OF APPLICATION FOR COMPENSATION OF ATTORNEYS OF UNION LAND & CATTLE COMPANY, AND SPECIAL COUNSEL FOR THE RECEIVER, AND FOR REPAYMENT OF COSTS AND EXPENSES ADVANCED AND PAID IN BEHALF OF SAID UNION LAND & CATTLE COMPANY AND ITS CREDITORS.

NOTICE IS HEREBY GIVEN, that on the 18th day of June, 1924, at the courtroom of the above-entitled court, in Carson City, Nevada, at the hour of ten (10) o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the undersigned will apply to said Court for an order authorizing the Receiver of UNION LAND & CATTLE COMPANY to repay to the undersigned the moneys by them advanced, laid out and expended for transportation, hotel charges and other expenses by them incurred in trips to and from said Carson City, and while there, and in and about and for the benefit of said Company, its creditors and all interested in the matter of said receivership, from May, 1923, to May, 1924, inclusive. And also for reasonable compensation for professional services as attorneys for said Cattle Company, and as special counsel for said Receiver and in the interest of said Cattle Company and of its creditors and others concerned in the properties in the hands of said Receiver; and all in protecting the

properties and estate of said Cattle Company in the hands of said Receiver from spoliation, waste, sacrifice and destruction.

The moneys expended by the undersigned for the purposes aforesaid aggregate the sum of Six Hundred Twenty and 57/100 Dollars ($620.57).

The fee which will be asked through the motion above mentioned for the professional services rendered by the undersigned during the period above limited, will be the amount to be fixed by the Court as a reasonable compensation [4] for the professional services referred to in and about the petitions, orders and appeals therefrom, heard and made in the above-entitled court, and for services performed in the several appeals taken from orders entered by the above-entitled court in said above enumerated matters.

The said motion will be based upon this notice, the records and files in the above-entitled matters, oral and written evidence to be introduced at the hearing of said motion, and the information and knowledge possessed by said Court.

Dated this 9th day of June, 1924.

(Sgd.) J. W. DORSEY and
(Sgd.) W. E. CASHMAN,
Attorneys for Defendant. [5]

Receipt of a copy of the within notice of applica-

tion for compensation and for repayment of costs, etc., is hereby admitted this 10 day of June, 1924.

_____,

Attorneys for Complainant.

McCUTCHEN, OLNEY, MANNON & GREENE,

Attorneys for Appellants.

M. R. JONES,

JONES & DALL,

Attorneys for First Federal Trust Co. et al, Trustees.

[Endorsed]: In Equity—B–11. In the District Court of the United States, in and for the District of Nevada. First National Bank of San Francisco, etc., Complainant, vs. Union Land & Cattle Company, etc., Defendant. Notice of Application for Compensation of Attorneys and for Repayment of Costs, etc. Original. Filed June 18, 1924. E. O. Patterson, Clerk. W. E. Cashman, J. W. Dorsey, Attorneys at Law, 201 Sansome Street, San Francisco, Cal., Attorneys for Defendant. [6]

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Plaintiff,

vs.

UNION LAND & CATTLE COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JUNE 19, 1924—HEARING ON PETITION FOR COMPENSATION OF ATTORNEYS—SUBMITTED.

The further hearing on the petition for attorney fees for Dorsey and Cashman came on regularly this day, the same counsel and parties being present. Mr. Greene states that he reluctantly reverts to certain statements made by the Court as to some inproprieties of parties to this suit and asks the Court to be more explicit in his statements. The Court states that he will write an opinion in this matter and fully cover his position therein but will make no statement at this time and counsel will have to wait until the said opinion is filed for his answer. Mr. J. W. Dorsey resumes the stand upon further cross-examination, after which petitioners rest. Messrs. S. W. Belford and J. W. Davey were each duly sworn and W. T. Smith was recalled and all testified for the objecting creditors and during their testimony Mr. Greene offered in evidence a certified copy of this Court's order made and entered March 17, 1924, relative to employment of additional counsel for the Receiver, admitted and ordered marked Creditor's Ex. *No.* "A"; also a certified copy of an order made and entered March 26, 1924, admitted and ordered marked Creditor's Ex. *No.* "B." Thereupon Creditors rest. Upon the Courts' order a certain letter from R. Spreckles to W. T. Smith, dated January 13, [7] 1922, was ordered marked Ex-

hibit No. 1. No further testimony being adduced and after argument by counsel for the respective parties this matter was submitted. [8]

In the District Court of the United States, in and for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND & CATTLE COMPANY, a Corporation,

Defendant.

OPINION

McCUTCHEN, OLNEY, MANNON & GREENE, HOYT, NORCROSS, THATCHER & WOODBURN, for Creditors: Old Colony Trust Company, The First National Bank of Boston, National Bank of Commerce in New York, The First National Bank of St. Louis, National Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago.

Mr. J. W. DORSEY and Mr. W. E. CASHMAN, for the Defendant and for the Receiver.

BROWN & BELFORD, for the Receiver. [9]

FARRINGTON, District Judge.

The property of the Union Land & Cattle Com-

pany has been in the hands of W. T. Smith, as Receiver, since July 28th, 1920. He had on hand January 1, 1924, as much land, about 6,000 less sheep and 2300 more cattle than when he took charge of the property. He started with more than $435,000 in bank; he has now $98,074.10 He has paid all expenses of operation, and more than $720,000 of the principal and interest due on secured obligations. Otherwise little or nothing has been accomplished in the way of settling the debts of the concern. For this unsettled condition the Court and the creditors, not the receiver, must be held responsible.

The order of appointment asked for and prepared by the First National Bank of San Francisco, and apparently approved by the creditors, authorized the receiver to collect all the assets of the defendant corporation, to carry on its business "according to the usual course of business of like character, and to employ such employees, accountants, agents, assistants and attorneys as he may deem necessary and proper." The reasons for such an order were thus stated in the complaint:

> "That the assets of defendant if prudently operated and administered can be realized upon over a period of time in amount sufficient to meet all of its liabilities and leave a considerable equity for the stockholders, but that the liabilities of the defendant already matured and those now about to mature cannot be met by the defendant at the present time, or as the same fall due, and defendant cannot at

this time market its livestock to advantage and by reason of the present financial condition it is impossible for the defendant to get additional credit to refund its obligations due and about to become due, and the defendant is not able and will not be able to meet its obligations as they mature in the ordinary course of business." [10]

This was a clear and confidently expressed judgment that if the estate were prudently managed as a going business under a receivership, the liabilities could be paid and a considerable equity preserved for the stockholders.

Early in 1923 there was filed an agreement to which all or practically all creditors were parties, providing that the property in the hands of the receiver be returned to the defendant company to be managed for a number of years as a going concern by a creditors' committee consisting of attorneys and bank officials, with Warren Olney, a San Francisco lawyer, as president.

This document disclosed a belief on the part of the creditors as late as April, 1923, after three years under the receivership, that the assets of the company could not be liquidated immediately and at forced sale without loss of a large part of their value, and that the property should be liquidated over a considerable period of time, and in an orderly manner. This cannot be construed otherwise than as a deliberately formed opinion that the business of the company should be continued during liquidation.

In May, after strenuous objection had been made to a proposed distribution of about $100,000 of defendant's funds among a number of attorneys acting for the creditors, this agreement was abandoned.

No demand for immediate liquidation had been made up to this time, but within a few weeks, and on the 18th day of May, 1923, the First Federal Trust Company filed a petition praying that it be permitted to foreclose the mortgage or trust deed executed in 1916 by the defendant company to secure the payment of $1,200,000 in bonds. Every installment of principal and interest on these bonds has, and at that time had been, paid promptly. The principal then due amounted to $840,000, or thereabouts. Foreclosure was demanded on the alleged [11] ground that the appointment of a receiver constituted a violation of one of the express provisions of said trust deed. It was then stated by Mr. Olney, attorney for the Trust Company and for the plaintiff, the First National Bank of San Francisco, that foreclosure would cost from $10,000 to $25,000, and it was necessary, because, by reason of the default created by the appointment of the receiver, the trustees named in the trust deed were powerless to release from the lien of said deed any mortgaged lands the receiver might sell. This assumption, kept constantly in the foreground, seems to have been sufficient to render fruitless any attempt on the part of the receiver to sell property covered by the trust deed. Would-be purchasers in view of the

uncertainties, naturally were afraid to invest. Holding the lands and disposing of the livestock, except in limited numbers, was considered as not only unwise, but highly imprudent, for several reasons: First, it would "disrupt and disorganize the business of the Cattle Company"; second, large values would be lost if the lands were stripped of the livestock; third, under the express provisions of the trust deed, Article 3, Section 16, and Article 4, Section 1, it was provided if at any time the livestock was reduced in numbers below 25,000 cattle above one year of age, and 25,000 sheep on the lands of the company or under its control in the States of Nevada or California, that event would constitute a default entitling the trustees to take possession of the mortgaged property, and sell it on such terms as they might fix.

August 24th, 1923, the trustees named in the trust deed, on the ground that the appointment of the receiver constituted a default, filed herein a petition asking that the mortgaged property be surrendered to them to be sold at public auction on such terms as they might fix. Within a short time thereafter eight petitions were presented by the bank creditors, [12] approving the application of said trustees, and asserting that the trustees were "entitled to immediately sell said property described in said trust deed in the exercise of the powers thereby granted." The prayer of the bank petitioners was that all the property of the Union Land & Cattle Company, except such thereof as may be sold by said Trust Company, be sold forthwith. Such a

program involved forced sales of everything belonging to the defendant company under conditions highly unfavorable. More than a year and a half prior to this date, January 13th, 1922, the then president of the Trust Company and of the First National Bank, wrote the receiver as follows:

> "The committee have come to the conclusion that we might as well call the creditors' agreement off and to take immediate steps to secure control of the company's affairs or failing in that to petition the Court for an order to sell the properties.
>
> "The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by actual purchase of the properties at foreclosure sale. I know there will be no change from this determination."

Every installment of interest and principal, amounting at the time to more than $400,000, had been paid out of funds on which the Trust Company had no lien; its security seemed ample, and the alleged default consisted in the appointment of the receiver, made by the Court without any knowledge or warning that under the terms of the trust deed such an appointment could be followed by such serious consequences. Under the circum-

stances it was considered by the Court and the receiver [13] that the claim of right to sell under the trust deed "was unjust and inequitable, and that if sustained on appeal it would cause irreparable loss and injury to the unsecured creditors, the very object the receivership was invoked to prevent"; furthermore, if the mortgaged property were sold at public auction by the trustees, as contemplated by the petitioners, the receiver, having no place to keep the stock, if any remained in his hands, would inevitably be forced to sell it. As a rule, at such sales prices received are small as compared with the value of the thing sold. Forced sales of all the mortgaged real property would therefore have been a calamity to every creditor not able to buy, or participate in buying, the property.

Petitions for orders directing the receiver to surrender the mortgaged property to the trustees, and to sell the remaining property forthwith, were denied, and appeals were speedily taken. The issues were of such vital importance that it was deemed expedient and necessary to employ additional counsel to assist Messrs. Brown & Belford in the presentation of the receiver's cases in the Circuit Court of Appeals. Accordingly, the receiver was directed to retain Messrs. Dorsey and Cashman. They were familiar with all the evidence and the issues involved; they were also heartily in accord, not only with the theory that the Trust Company had waived the alleged default, notwithstanding the provisions against waiver in the trust deed, but that the receivership could not be a default within the meaning

of the trust deed, if, when the receiver was appointed, the Court was not informed that under the trust deed such an order of appointment would constitute a default entitling the trustees to immediate possession of all the mortgaged property, with the right to sell it on such terms as they might fix.

The services performed by them were not only exceedingly valuable, but they are deserving of much larger compensation [14] than the $2500 which I here allow. To argue that their assistance was unnecessary and the employment unwise, might perhaps be regarded as depreciating the ability and legal skill of the array of eminent and confident counsel opposed to the four attorneys representing the receiver.

Trustees etc. vs. Greenough, 105 U. S. 527;
Burden Central Sugar-Refining Co. vs. Ferris Sugar Mfg. Co., 87 Fed. 810.

Said fee of $2500, and the costs necessarily incurred by Messrs. Dorsey and Cashman in printing briefs, etc., will be paid by the receiver.

The purchase of the Lesher land does not at first view seem like liquidation, but on careful consideration it appears to me that its acquisition is not only vital, but that it will faciliate rather than delay sale of the Spanish Ranch. In itself it is well worth the money asked. It is in the mountains and is covered with a large amount of feed; this, with its elevation, makes it valuable as summer range, and especially so in a dry year. Several hundred steers can be fattened thereon each season. It possesses a singular strategic value due to its

location in the heart of a large and valuable range used and claimed in connection with the Spanish Ranch. An independent owner of the tract can graze sheep over the surrounding range in such manner as to take much of its use and value away from those who may be operating the Spanish Ranch. Incomplete control of the range, if a fact, will be given much weight by anyone contemplating purchase of this portion of the property. The receiver was therefore ordered to complete the purchase of the Lesher land.

1 Tardy's Smith on Receivers, 253 et seq. [15]

The time has come when the property must be sold and its proceeds distributed among the creditors. By this it should not be understood that sales must be forced at that season of the year when there is no market, or a very poor one, or that the property is to be unnecessarily sacrificed in order that liquidation may be accomplished to-day rather than to-morrow. The interests of the unsecured creditors must be kept in view, and likewise the fact that the receiver is still confronted by the trust deed, and the restrictions contained therein. It is essential to the good title of a purchaser that the lands sold be released from the lien of the trust deed.

The provision that any reduction of the livestock below 25,000 cattle over one year old, and 25,000 sheep, shall constitute a default entitling the trustee on notice to take possession of all the mortgaged lands and the livestock thereon, has not been abandoned. In open court the attorney for the trustees clearly and emphatically stated that the trustees

proposed to stand on their rights under that instrument.

The proposal that only a limited amount of hay be put up; that the mortgaged lands be sold, subject to the lien of the bondholders, in one parcel, at public auction about December 1st, and that such livestock as cannot be disposed of at private sale, before some fixed date, be sold under the hammer, is not one which commends itself to the Court.

The hay crop in Nevada will be unusually short this year. According to careful estimates there are 50,000 more cattle in this state than can be carried through the season on present supplies of feed, grass, hay, and hay to be cut. Similar conditions, owing to the extreme drought which prevails everywhere west of the Rocky Mountains, exist in all neighboring states. Hence, large numbers of cattle must be sold and shipped out of Nevada. These conditions will tend [16] to reduce prices, and also to enhance the value of hay. Hay is already being contracted in the stack at $20 per ton. The receiver has on hand 7,000 tons of old hay, and confidently asserts that he will be able to cut not less than 18,000 additional tons. This hay can be cut and stacked at an expense of not more than three or four dollars per ton. To refuse to cut this hay is simply to throw away values which ought to go to the creditors, and to run the risk of starving large numbers of cattle. The witnesses without exception testify that the receiver should put up all the hay possible; if not consumed, it can be sold at

a large profit. Failure to cut and stack the hay crop will spell nothing but loss and disaster.

The receiver is therefore directed to put up all the hay on the lands in his possession which can, in his judgment, considering the present prices of hay and the probability of a severe winter and the shortage of feed, be profitably cut and stacked.

All witnesses have testified that the liquidation ought to proceed in an orderly manner, and that the property should be sold as a unit, or in separate units, as far as possible, in order to preserve the value inhering in the property as a going concern. They also testify that much better results can be obtained by selling the livestock and the lands together, than by selling them separately; and that private sales are to be preferred to public auction.

The receiver should at once endeavor to sell each ranch or each parcel of ranch land, with its farming equipment, livestock, spring, summer and fall range, as a unit, and as a going concern.

It is not considered that the present supply of feed, including the 18,000 tons of hay which can be put up, will be sufficient to carry all the company's livestock. The receiver must therefore prepare for speedy disposal, or removal [17] to other pastures, and thereafter sell at the earliest practicable date all livestock which will bring the market price, or a reasonable one, in so far as it is, in his judgment, advisable to do so, provided that he should not, without the consent of the First Federal Trust Company, or further order of the Court, make sales which will reduce the number of livestock below the

limit fixed in the trust deed. The receiver has been given abundant assurance that the Trust Company will co-operate with him in any just and equitable method of closing this receivership, and disposing of the property. There is in my opinion no necessity for further litigation with that corporation, and all occasion therefor should be studiously avoided.

It is unwise to fix any date when the properties remaining in the hands of the receiver must be sold at public auction. With a property so large and herds so numerous, the natural effect of such an order will be to check private sales and depress prices. It will be sufficient to order such sale when the necessity arises. All the testimony without exception, shows there is no demand for stock cattle at the present time, and that no one wants such cattle unless he has, or knows where he can obtain, feed and hay for them during the coming winter. Cattle are of no use as beef until properly fattened for the market. At the end of a dry season like the present, cattle cannot be expected to come off the ranges in marketable condition. They must be fed before they can be sold as beef, and this the receiver is better prepared to do than stockraisers in general. The demand for stock cattle is in the spring, in March, April and May when there is grass on the ranges. The wool and the lamb crop come in the spring. Hence the unwisdom of forcing all this property on the market at once is apparent. That it is unwise is the judgment of every witness

testifying as to how the property can be most advantageously disposed of. [18]

Much must be left to the judgment of the receiver, and he is hereby directed and authorized to proceed diligently to sell the property of the Union Land & Cattle Company in his hands in accordance with his best judgment, at current prices as far as possible, and as soon as there is a market for the whole or any portion thereof, having due regard at all times to the effect of each sale on the salability and maintenance of remaining assets. When satisfactory sales cannot otherwise be effected, he may sell the property on such terms as he may deem best for the interest of all parties, provided that he shall not sell upon a longer credit than three years from the time of sale; and in all such cases he must retain ample and unquestionable security for deferred payments.

Koontz vs. Northern Bank, 16 Wall. 196.

He is also authorized to take such measures as in his judgment may be necessary to advertise the property for sale, and to procure purchasers therefor.

The following disbursements, to wit, $7,500 to Brown & Belford and $24,000 to W. T. Smith, are hereby allowed and approved as payments on account.

This order is not to be regarded as fixing any specific rate of compensation.

The receiver is also authorized to pay to R. M. Lesher $4,241.33 as the final payment on contract for the Lesher land; and the previous payments of

$1,000, $1,000 and $4,241.30 in the same transaction are confirmed and approved. [19]

[Endorsed]: No. B–11. In the District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land & Cattle Company, a Corporation, Defendant. Opinion. Filed August 4th, 1924. E. O. Patterson, Clerk. [20]

In the District Court of the United States, in and for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant.

ORDER AUTHORIZING PAYMENT OF ATTORNEYS' COMPENSATION.

This matter coming on to be heard this 19th day of June, 1924, upon the petition of W. T. Smith, receiver of Union Land and Cattle Company, for instructions and directions as to the liquidation of the property and assets of said Union Land and Cattle Company in his possession as such receiver, and it appearing to the Court that due notice of

said petition had been published and served upon the parties to the above-entitled suit and upon all creditors of said Union Land and Cattle Company, and that said petition had been duly served upon the parties to said suit, and the said receiver appearing by Brown & Belford, J. W. Dorsey and W. E. Cashman, his attorneys, the said Union Land and Cattle Company appearing by J. W. Dorsey and W. E. Cashman, its attorneys, First Federal Trust Company appearing by Jones & Dall, its attorneys, the following creditors; W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maude B. Clemons, Francis C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey appearing by J. W. Dorsey and W. E. Cashman, their attorneys, Silveria Garat, a creditor, appearing by Fred L. Dreher, her attorney; the following creditors: Old Colony Trust Company, The First National Bank of Boston, [21] National Bank of Commerce in New York, the First National Bank in St. Louis, National Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago, appearing by McCutchen, Olney, Mannon & Greene, their attorneys; and it further appearing to the Court that said Old Colony Trust Company, The First National Bank of Boston, National Bank of Commerce in New York, The First National Bank in St. Louis, National Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago, had filed an answer and cross-petition to the petition of said receiver, and that said Union Land and Cattle Company and W. T. Hitt,

Emma McLaughlin, Henrietta Moffat, Maud B. Clemmons, Francis C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs Aloysius Davey and J. W. Dorsey and said receiver, W. T. Smith, had filed an answer to said cross-petition of said banks in opposition to the relief prayed for in said answer and cross-petition of said banks and said petition of said receiver, W. T. Smith, being called for hearing by said court on said day, and having been heard upon the pleadings filed in said proceeding and upon the evidence offered by said receiver and by said individual creditors and said Union Land and Cattle Company, and upon the testimony of the witnesses for said parties, and the matter having been duly submitted to the court on the 20th day of June, 1924, and the Court now being fully advised in the premises;

IT IS ORDERED that W. T. Smith, receiver of the Union Land and Cattle Company, shall proceed forthwith and as speedily as may be to sell and dispose of the property and assets of said Union Land and Cattle Company; that such sales shall be made in accordance with his best judgment and for the best terms obtainable by him; that he is hereby authorized and directed to negotiate for such sales with such purchasers as he may be able [22] to procure, and to make and execute contracts for such sales with such purchasers, and to deliver to such purchasers any and all property purchased by them pursuant to such sales and contracts.

IT IS FURTHER ORDERED that the said W. T. Smith, as such Receiver, shall be and he hereby

is authorized to take such measures as in his judgment may be necessary to facilitate the sale and disposition of such property, and to cause advertisements to be published of such sales wherever deemed necessary by him.

The said W. T. Smith, as such receiver, is further directed to take such measures as may be necessary to secure the payment to him as receiver of all accounts that may be due to said Union Land and Cattle Company from the Antelope Valley Land & Cattle Company, a corporation of the State of California, and further to collect for said Union Land and Cattle Company any indebtedness that may be due to it from any other person, company or corporation.

The said W. T. Smith, as receiver, in the sale and disposition of such property and assets, is advised to proceed with such liquidation so as to sell whenever it shall be practicable, land and livestock together rather than separately, as going concerns, and in such units, divisions, subdivisions or parcels as may be desired by purchasers; and further, if sales may be made in this manner, the said W. T. Smith, as receiver, is hereby expressly authorized to take such measures as may be necessary to constitute or form from the property of said Union Land and Cattle Company such units, divisions, subdivisions or parcels as may be agreed upon between the said W. T. Smith and any purchaser or purchasers.

In the sale, liquidation and disposition of said property [23] and assets, the said W. T. Smith,

as such receiver, is expressly directed not to commit any act which may constitute an event of default as defined in that certain deed of trust executed by the Union Land and Cattle Company to said First Federal Trust Company and Milton R. Clark, as Trustees, on September 1, 1916, and that until the further order of the court, such liquidation shall proceed subject to the provisions of said deed of trust; that is to say, the receiver shall not sell, without the consent of the trustees named in said deed of trust, cattle or sheep in numbers that will reduce the number of cattle upon said lands to less than 25,000 not less than one year old, or the number of sheep upon said lands to less than 25,000. When during the liquidation of the property and assets of said Union Land and Cattle Company, the receiver shall have sold all cattle, except 25,000 head not less than one year old, and all sheep except 25,000 head, he shall immediately report such fact to this court, and apply for further instructions concerning the subsequent liquidation of such property and assets.

The said W. T. Smith, as such receiver, is further ordered and directed, in case sales of real property are made, to negotiate with said First Federal Trust Company and Milton R. Clark, Trustees, for any release or releases which it may be necessary to secure in order to effect sales of any real or other property which is subject to the lien of that certain deed of trust hereinabove referred to. This order also applies to the sale of the capital stock of the Antelope Valley Land & Cattle Company covered by said trust deed.

The said W. T. Smith, as such receiver, is further ordered and directed to harvest, cut and stack such hay as may be produced from the lands in his possession, and to use the same in feeding and properly providing for the livestock during such liquidation. If it shall be found that there is a deficiency [24] of such hay to properly care for such livestock until the liquidation thereof shall be completed, then the said W. T. Smith is directed to apply for instructions to this court with regard to all purchases of additional hay; and the said W. T. Smith is hereby authorized and directed to sell any surplus of such hay that may remain subsequent to the time of such sales of such livestock for the best terms obtainable therefor.

The said W. T. Smith, as such receiver, is hereby ordered and directed to proceed, without unnecessary delay, in the sale and liquidation of the property and assets of the McKissick Cattle Company, a corporation of the State of Nevada, subject to the provisions of any mortgage existing upon any of its property, and such receiver is advised in such liquidation to endeavor: (1) To sell and dispose of all the capital stock of said company, if purchasers can be found therefor; (2) To sell the property of said company as a going concern, land and livestock together and as a unit; (3) To sell and dispose of said property, land and livestock together, in such subdivisions as may be desired; (4) To sell and dispose of land or livestock as the same may be salable to any purchaser. The directions and advice hereinabove given shall not be deemed or construed by the

said receiver to authorize any departure by him from the terms of the option to purchase heretofore executed to M. R. Keiffer, and now outstanding.

The said W. T. Smith, as such receiver, in the sale of beef cattle, is hereby directed and ordered to proceed with such sales as rapidly as such cattle can be prepared for market and in as large lots as are possible to be prepared. While such sales may be made by him in accordance with his best judgment, current market prices for the numbers of said cattle which may be offered to the market, should when practicable be obtained. [25] The same advice is given to the receiver in the sale of sheep so far as in his judgment it may be practicable.

The receiver is further expressly authorized to sell and dispose of any or all of the property of said Union Land and Cattle Company by public sale or by public auction whenever in his judgment such sales by such methods are practicable to be made, and whenever in his judgment such sales, the element of time being considered, will or may result in better prices than may be obtained by private sales or by sales by other methods.

The said W. T. Smith, as such receiver, is hereby authorized and directed to sell and dispose of the personal property and equipment on the various ranches aud properties of said Union Land and Cattle Company in any manner deemed best by him as rapidly as such personal property and equipment may reasonably be dispensed with in the operation of such properties or ranches.

The following disbursements: $7,500 to Brown & Belford and $24,000 to W. T. Smith, are hereby allowed and approved as payments on account. This order is not to be regarded as fixing any specific rate of compensation.

The receiver is also authorized to pay to R. M. Lesher $4,241.33, as the final payment on contract for the Lesher Land; and the previous payments of $1,000, $1,000 and $4,241.30 in the same transaction are confirmed and approved. He is also directed to pay to J. W. Dorsey and W. E. Cashman $2500, for services heretofore rendered the receiver in the Circuit Court of Appeals.

E. S. FARRINGTON,
District Judge. [26]

[Endorsed]: No. B–11. In the District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land & Cattle Company, a Corporation, Defendant. Order. Filed August 4th, 1924. E. O. Patterson, Clerk. [27]

In the District Court of the United States, in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

STATEMENT OF EVIDENCE.

The application of Messrs. J. W. Dorsey and W. E. Cashman for compensation as attorneys for Union Land and Cattle Company and special counsel for the receiver, and for repayment of costs and expenses, alleged to have been advanced and paid on behalf of said Union Land and Cattle Company and its creditors, came on regularly for hearing before the Honorable E. S. Farrington, Judge of the above-entitled court, on Wednesday, the 18th day of June, 1924. Upon said hearing said J. W. Dorsey and W. E. Cashman appeared *in propria persona,* and said [28] Messrs. J. W. Dorsey and W. E. Cashman also appeared for said defendant Union Land and Cattle Company; said W. T. Smith as receiver of said Union Land and Cattle Company appeared by Messrs. George S. Brown and Samuel W. Belford and by said Messrs. J. W. Dorsey and W. E. Cashman; interveners above named appeared by Messrs. McCutchen, Olney, Mannon & Greene, by A. Crawford Greene, Esq., and John F. Cassell, Esq., and by Messrs. Hoyt, Norcross, Thatcher & Woodburn, by George B. Thatcher, Esq.

Thereupon the following proceedings were had and the following testimony and evidence were presented:

TESTIMONY OF W. E. CASHMAN, FOR APPLICANTS.

Mr. W. E. CASHMAN, called as a witness for applicants, was duly sworn and testified as follows:

The WITNESS (on Direct Examination by Mr. DORSEY).—J. W. Dorsey and W. E. Cashman were employed by the Union Land and Cattle Company to represent it in this receivership matter, in the case of the First National Bank of San Francisco vs. Union Land and Cattle Company some time in May 1923. They performed services in the matter of the application of the First Federal Trust Company to sue the receiver which was filed in May of 1923. That matter occupied, I think, three different trial days in this court besides the preparation previous to the first hearing, and the preparations of necessity in between the several hearings and I think it terminated on the 9th day of July, 1923. The next matter was the application of the First Federal Trust Company for an order of this Court directing the receiver to return the properties that were covered by the trust deed to the trustees named in the trust deed [29] for the purpose of sale. That was filed some time in August, 1923. Then following that was an application made by the complainant in the action for an order for speedy liquidation. Following that an application was made by seven eastern banks for the same purpose. Those matters came on for hearing finally in October, and I think were sub-

(Testimony of W. E. Cashman.)

mitted some time during that month. Then there was an application made by the receiver for leave to purchase livestock which was filed some time in October and heard in October and determined some time in November. Following that appeals were were taken by the First Federal Trust Company, The First National Bank, and what I term the eastern banks, from the orders of the Court made denying the relief prayed for in their various petitions. Now, I have taken from my notes the days and dates, and some of the work that was done beginning with May 28, 1923, and carried down to and including April 8, 1924, which was the day following the date of the decision of the Circuit Court of Appeals. These services were all performed between May 28, 1923, down to and including April 8, 1924. hey included the examination of authorities, witnesses, various trial dates in this court, preparation of statements of evidence to be used on appeal, preparation of transcripts, the examination of authorities on the appeals, and the preparation of the briefs that were finally filed in the Circuit Court of Appeals, and the preparation for argument in that court; and practically from May 28th to July 9th, practically every day of that time was consumed in work in connection with the trial of the first case, not only with me but with yourself; we were in constant consultation and constantly at work upon the question involved in those various proceedings. It necessitated thirteen trips from San Francisco to Carson City and [30] re-

(Testimony of W. E. Cashman.)

turn. Up to the present time I paid the expenses of those trips, or advanced the money for them. The correct amount of moneys so advanced is $620.57. That was the actual outlay in carfare and hotel bills and a large part of that time we were entertained at private houses. During all of the time we had opposition in these matters, other attorneys opposing or contesting the petitions—all of the time these were strenuously contested. The first application was made by the First Federal Trust Company, McCutchen, Olney, Mannon & Greene representing petitioner at that time. On the second application that was made by the First Federal Trust Company, it was represented by Messrs. Jones & Dall. The applications of the various unsecured creditor banks were represented by McCutchen, Olney, Mannon & Greene's office, by Mr. Greene, by Judge Olney and Mr. Mannon, and Mr. Thomas was here, I believe, and Mr. Cassell. The firm of McCutchen, Olney, Greene et al. were present and litigated for one or others of the creditors in all of these applications at all of the hearings. Mr. Jones from the time that he became the attorney for the First Federal Trust Company, continued to serve it as its attorney, until the judgment or decree of the Circuit Court of Appeals. There were several attorneys of the firm of McCutchen, Olney, Mannon & Greene here at all times—at least two lawyers, and I am not sure but that on one or two occasions there were three. I may be mistaken about that. The office of Hoyt, Norcross,

(Testimony of W. E. Cashman.)

Woodburn & Henley was also present at all of these hearings and were present for the contesting banks.

Cross-examination by Mr. GREENE.

The WITNESS.—(Continuing.) On May 29th and 30th, 1923, at the inception of our engagement in this litigation, we were acting for the Union Land [31] and Cattle Company. There were various creditors we have represented for a good many years, but the contest was carried on by the Union Land and Cattle Company. The creditors which we have represented for some time are: W. T. Hitt, Frances C. Rickey, Mrs. Emma McLaughlin, Miss Henrietta Moffat, Mrs. Elizabeth Sharpe, Mr. Dorsey's claim, J. W. Davey, Mrs. Clemmons, Mr. Frasier, and Mr. Dill. We didn't represent Mr. W. H. Moffat in any capacity as a creditor. We represented his interest in connection with this litigation only as president of the corporation. Mr. Moffat had and still has a stockholding interest in this company. We represented the company since 1913, I think. Mr. Moffat had at that time a one-third interest in the company. We never represented Mr. H. G. Humphrey in this proceeding but have done so outside of this proceeding. Mr. Moffat was usually present at all the proceedings. I have occasionally reported to Mr. Humphrey what took place here. Mr. Humphrey has been partially advised of what has been going on, but not altogether so far as I know. I haven't seen Mr. Humphrey a half dozen times in the last sixteen months. We have absolutely

(Testimony of W. E. Cashman.)

no arrangement whatever for compensation either with the Union Land and Cattle Company or any or all of the creditors to whom I have just referred. There was no arrangement of any kind with reference to paying for our services. I do not mean by that that we volunteered our services on behalf of those people; but the employment was made and there was no telling to what extent we would be called upon to perform services and it was a matter left absolutely to the reasonable value of the services. I do not expect to collect from the corporation for the work that was done for them because in the first place, as far as we know, Mr. Humphrey and Mr. Moffat are without funds [32] or means of paying. Everything they had was taken and deposited or assigned for the benefit of creditors, and so remains. As far as their personal representation is concerned, I do not think that for that reason it is proper that their representation and the cost of it should be borne by the other creditors to the proceeding, but as far as the representation of the company itself is concerned, and the assets of the company, I do. I think that their personal representation compares as a very small amount with the representation we were giving to the company. I could not say how much fractionally. I will have to come to that conclusion ultimately undoubtedly. My judgment at this time is that all the service that has been rendered since May, 1923, to April 8, 1924, should be paid entirely by the company. The ser-

(Testimony of W. E. Cashman.)

vices are of importance to the creditors of the company because they have resulted in the protection of the assets for the benefit of the creditors. With the exception of $5.00, the amount which I have cited for expenditures was all expended prior to March 1, 1924; and that began with May 25, 1923. In February, 1924, Mr. Smith called up the office and requested us to prepare briefs, prepare and file briefs in the appeal as special counsel for the receiver, and I think that that was later confirmed by receipt of a certified copy of an order made by this court; I don't remember just offhand what that date was. As I recall it, it was about the middle of the month. Mr. Smith advised us that the purpose of our employment was to assist in the presentation of the appeals then pending in the Circuit Court of Appeals, that is to assist Messrs. Brown & Belford as additional counsel. I don't think there was any further discussion with reference to those briefs; I think we went right at it, to work along those lines. [33] There was some correspondence between us and Brown & Belford; I think that some of the points were discussed; that outlines of the points to be made were passed from one office to the other; independent briefs, however, were filed. The reason for filing independent briefs was that the time was short as we could not get them to Reno and back and *vice versa,* in order to have them printed and served and filed within the time in which we had to do it. We were, however, in entire accord with

(Testimony of W. E. Cashman.)

reference to the preparation of the briefs. There was no question as to matters of policy in connection with the presentation that I recall. We were in entire agreement as to the matters to be presented, but probably not always as to the method of presentation. I am quite certain of that. There was no disagreement that I recall between Messrs. Brown & Belford and ourselves as to the treatment to be given those briefs. We did not have any discussion with Brown & Belford with reference to the treatment to be given those briefs to the charges of fraud and impropriety that had been made against the First Federal Trust Company and the other parties to the litigation. That was only a matter of discussion as between us. It was never a matter of discussion as between us and Mr. Smith. What led us to vigorously support those charges when our associate counsel did not support them was that we argued our points in those matters based upon the argument of the appellants, so far as the Union Land and Cattle Company, the defendant in the action, was concerned. I do not recall that I knew that Brown & Belford were not making the charges in their briefs that were made in ours until after the brief was printed,—as to how they were to treat that particular phase of it. [34]

The COURT.—I don't know, Gentlemen, just exactly where this is going to end, but I am perfectly willing to state my reasons for making that order, if it is deemed by counsel necessary.

(Testimony of J. W. Dorsey.)

Mr. DORSEY.—I am responsible for any aspersions in that brief, I wrote that brief myself, I am fully responsible, and Mr. Cashman had nothing to do with it.

TESTIMONY OF J. W. DORSEY, FOR INTERVENING BANKS.

Mr. J. W. DORSEY, called as a witness by the intervening banks, having been duly sworn, testified as follows:

The WITNESS (on Direct Examination by Mr. GREENE).—In all the proceedings to which Mr. Cashman has referred, including those referred to in connection with my employment by the receiver, I was acting exclusively for the Union Land and Cattle Company, from the beginning of the proceedings initiated by the filing of the petition to sue the receiver until, and only until we went, just before we went into the hearing of the case on appeal. I represented, I think, [35] all the creditors in all things that I have done since I was first employed by the Union Land and Cattle Company, not only the particular creditors mentioned by us, and our own creditors, but your clients. I thought I knew I represented the First National Bank of Chicago, and I think I know I did. I think the attempt here was to destroy this institution, to sell this institution and I thought, and still think that those proceedings would have resulted, if successful on your part, in destroying the value of the property, impoverish

(Testimony of J. W. Dorsey.)

my clients, and hurt, I mean lessen the moneys that your clients would receive. I thought the course that I was taking was for the advantage of the creditors, and all of the creditors of the Union Land and Cattle Company. I was representing the company which owed these obligations to the creditors, and I acted in behalf of all the creditors, if that is what you mean. I was really employed by and acted for the company, and in the interest of the creditors, and that is the only interest I have. Let me make a preliminary statement. Perhaps I was a bit hasty this morning in saying in the weakness of the moment that at this hearing I was representing the receiver. I want to say what I have done in behalf of the receiver, or in that interest, was done because it was to the advantage of the Union Land and Cattle Company to have it done; I was called to render that assistance, and I want nothing for it, and my bill does not include that, I want no pay for that. I want no pay for anything done in the interest of the receiver as such; so that this claim does not include any services rendered to the receiver, either in this court or the appellate court, or in this proceeding. Therefore, my claim is made for work done wholly in the interest of the Union Land and Cattle [36] Company, incidentally and of course primarily in the interest of its creditors. No claim has been fixed. I want, if the Court thinks it proper, a reasonable compensation for services rendered. I was opposed by a number of rather

(Testimony of J. W. Dorsey.)

eminent and very able gentlemen and I had a great deal of work to do, at least to me it was. The most of the time for months was spent in matters concerning these petitions; we devoted a great deal of our time to it; had much difficulty and we never got more than over one trouble when we were plunged into another. I have no suggestion to make to his Honor as to what I should receive. I intend to call you on the witness-stand and ask you what service of that kind is worth. I am willing to submit it just that way. [37]

Mr. DORSEY.—I don't think I said we don't expect to get money out of the hands of the receiver. I certainly expect in the protection of the property for the benefit of creditors to be paid, as a laborer would be paid, or a man who saved your house from destruction, or saved your property from ruin; it is rendering a service in the interest of creditors.

Mr. GREENE.—I think that is all, Mr. Dorsey.

The COURT.—I don't know that I should let the matter rest as Mr. Dorsey puts it. I thought Mr. Dorsey rendered a real service to the receivership and to the Court, and in the appellate court, for which he should be paid.

Mr. GREENE.—If that is the case I think we ought to have the explanation, and I ask for it.

Mr. DORSEY.—Unless it is necessary I can't see what possible use it will be.

The COURT.—It is going to be unpleasant. You say it is a reflection on you. Now some things

(Testimony of J. W. Dorsey.)

have occurred here with your firm which I didn't particularly admire; and I think if you want to hear it we will have it in chambers, it is not a matter that needs publication.

Mr. DORSEY.—I don't think that they are entitled to it, if your Honor please. We have no charge, and didn't intend to have any against the receiver, and the petition does not ask for anything as services in behalf of the receiver; we have asked for compensation, it is out of his hands, but it comes out of the property that belongs to this company.

Mr. GREENE.—Colonel Dorsey, in your petition you ask for compensation on account of services rendered to the receiver, unless I am very much mistaken. [38]

Mr. DORSEY.—Well, maybe that is so, I don't remember. If it is so, I withdraw it. Professional services rendered, and as special counsel for the receiver; I move that be stricken out; I withdraw that statement. I think I put that in myself. If your Honor is ready to proceed we will call a witness.

TESTIMONY OF M. R. JONES, FOR APPLICANTS.

Mr. M. R. JONES, witness called by applicants, being first duly sworn, testified as follows:

WITNESS (on Direct Examination by Mr. DORSEY.—I have represented the First Federal

(Testimony of M. R. Jones.)

Trust Company and Mr. Milton R. Clark, Trustees, from the time a petition for leave to intervene and sell the properties in the possession of the receiver was filed in this court and case on August 25, 1923. I have been present in a number of those hearings when these petitions were heard and I took part in the matters relating to the appeal. I prepared a brief myself and read the brief prepared by Mr. Cashman and Mr. Dorsey. In the preparation, or in the agreements which resulted in the transcript as filed, we had a number of interviews. I know generally the character of services that were performed in reference to the First Federal Trust Company matters and such matters as I saw in this court when I was here. I know generally what was done by myself and I saw and know generally what was done by other counsel so far as it related to the deed of trust. As to the other matters there were hearings here, I think, running over a week or two weeks following my petition and I was not present.

Q. Omitting those, and considering that the work was done that you know something of, that you were a part of, what in your judgment is a reasonable compensation for those services?

Mr. GREENE.—I object, your Honor, and the ground of my objection [39] is this, that under no conceivable set of circumstances can counsel for the defendant company be entitled to compensation out of the receivership fund, and that this examination is entirely immaterial and irrelevant.

(Testimony of M. R. Jones.)

The COURT.—Objection overruled.

Counsel for the interveners thereupon excepted to the said ruling of the Court overruling said objection and hereby assign said ruling as Interveners Exception No. 1.

WITNESS.—Can you give me in addition to that any number of days that we were here, or number of days you spent on the preparation of your briefs?

Mr. DORSEY.—Can you, Mr. Cashman? Mr. Cashman has here a list of service and work performed, I kept no journal entries. The preparation of the brief on appeal was constant from the beginning; we argued in March; and beginning on the 10th day of March, or about that time, to the time of the argument, or the time of the filing of the brief, the preparation for these various things I would say ran through and occupied several months. From September the 18th, 1923, until the 20th day of October, 1923, the service was daily.

WITNESS.—Will you let me see the record. (The paper is handed to the witness.) Will your Honor permit me to look at this a moment.

The COURT.—Certainly.

Mr. CASHMAN.—Those notes do not give in detail all that was done, they are simply memoranda dictated at the end of a day to the stenographer for reference.

Mr. DORSEY.—And no notes by me.

Mr. CASHMAN.—None by Mr. Dorsey. [40]

A. Taking into consideration—so you will know

(Testimony of M. R. Jones.)

on what I base my answer—in charging a fee I take into consideration, first the amount of work done; second, the amount involved, and third, the success or real service to my client. I am assuming in answering your question, that I am to take into consideration the fact that you were here the four trial days, so far as the First Federal Trust Company's matter was concerned, and I think I must necessarily confine my answer to what I know about it, as you have eliminated some of the work done for the receiver.

Mr. DORSEY.—I did nothing for the receiver that I didn't do for the company; I did it all for the company.

A. Four days on the first petition, probably that many more on the second petition; I know you made an examination of the proposed statement on trial, proposed statement of evidence on the appeal of the First Federal Trust Company; and I assume that there was another statement of approximately the same size from the First National Bank's appeal; and I think a very small statement on the appeal from the order allowing the receiver to issue certificates; and that you wrote a brief of probably a hundred pages during that time on both of the appeals. Is that about correct?

Mr. CASHMAN.—Larger than that.

A. Well, those are approximate.

Mr. DORSEY.—One hundred seven pages in one, I have forgotten the other; and a brief in each appeal. Just a moment, and we will give you ex-

(Testimony of M. R. Jones.)

actly the number of pages, but I didn't charge by the page. In appeal number 4194, the one in which you were interested, there were 111 pages; appeal number 4195, there are 42 pages; and appeal 4196, there are 34 pages.

A. I am lacking in one element in what I take into consideration when I make an estimate; I can't take into consideration [41] the real value to your client; your views and my views as to the value of the service to your client differ.

Q. What we were opposing, you recall, was turning over the properties to the First Federal Trust Company; and they were not turned over to the First Federal Trust Company; we don't differ as to that.

A. We differ as to whether that should have been done.

Q. Yes.

A. So that element I can't consider. From the work that I think was done, I think that work ought to be fairly worth somewhere between three and five thousand dollars.

Q. Mr. Cashman's and mine too; the work done by Mr. Cashman too?

A. I can't segregate the two of you.

Q. You think that is what the service is worth?

A. Yes; I do not take into consideration the element of success, because you and I differ as to that, as to whether that should be taken into consideration.

TESTIMONY OF A. CRAWFORD GREENE, FOR APPLICANT.

Mr. A. CRAWFORD GREENE, called as a witness for the applicant, having been duly sworn, testified as follows:

The WITNESS (on Direct Examination by Mr. DORSEY.)—I am familiar with all of the proceedings on these various petitions, the trials of them and appeals from them, the work that was done generally in the case by my firm, by Hoyt, Norcross, Thatcher, Woodburn & Henley, by Jones & Dall, and by Cashman and Dorsey; I have a general view of the situation as a lawyer.

Q. Mr. Greene, what would you charge your client for those services that were performed on behalf of the Union Land and [42] Cattle Company, assuming that we did no work for any other person or corporation?

Mr. THATCHER.—We make the same objection as heretofore made to testimony of the same kind.

The COURT.—The same ruling.

Mr. THATCHER.—And upon the further ground, we would like to add, that it is a matter of private contract between the Union Land and Cattle Company and their attorney, and not a matter for determination by this court in this proceeding.

The COURT.—Well, that objection is good if the first one is good; and if the first one is bad that one is bad, so they are both involved in the same thing, and it will be the same ruling.

(Testimony of A. Crawford Greene.)

Counsel for interveners thereupon excepted to the said ruling in the court and hereby assign said ruling as Interveners' Exception No. 2.

The WITNESS.—(Continuing.) I think, Colonel Dorsey, that your service was of value to two people only, so far as I know, and they were W. H. Moffat and H. G. Humphrey. The reason I am proceeding as a I am is because I want you to get clearly my point of view and the probable reason my advice on this subject is not going to be of very much value to you. I think you have performed a valuable service from the point of view of H. G. Humphrey and W. H. Moffat, in the point of view of delay. You have delayed—you and others—the liquidation of this property; but as far as the point of view of the creditors of the Union Land and Cattle Company as a whole, I think you have done them a positive damage; and I think when the end of the road is reached, they are going to appreciate the losses they have been subjected to. With reference to compensation, [43] if I were going to fix your compensation—I don't know what time you put on it, other than court appearances.

The COURT.—Mr. Greene, your opinion may be that this work done by the attorneys was a positive detriment, and that the only proper thing was for your requests to have been granted, and the property turned over to the First Federal Trust Company. This court was unwise enough to disagree with you on that, and it rather looks as though another court has been equally unwise; it seems to

(Testimony of A. Crawford Greene.)

me that it is out of the question now. The question is how much these services are worth, that is all, as services. I don't think it is necessary to criticize the court, this court or the other, or to criticize the attorneys who prevailed on certain motions.

A. There is no criticism.

The COURT.—It is a question as to what the services are worth.

The WITNESS.—(Continuing.) I have been asked as I understand the question to fix, or to suggest a fee for particular services; my only experience with those with whom I have been associated, is that a fee must largely be determined by the success of the service rendered; its advisability and propriety; and in fixing a fee, I cannot fix it without reference to those facts. I was going to proceed to say to Colonel Dorsey, if he would give me a list of the dates on which a complete day's service had been given to his client, it becomes a very simple matter, from my basis of computation as to what he should receive as a per diem remuneration; but I don't think the service has resulted in a success which warrants much more than that from his point of view. [44]

Mr. DORSEY.—(Q.) Supposing it occupied throughout the time we have been employed, four months?

A. Well, that would depend very largely on what your basis of compensation is; on a per diem basis, that varies all the way, as you know, from fifty to

(Testimony of A. Crawford Greene.)

five hundred dollars a day; and your past experience would be a better indication to you as to what you should receive for your services than any guess I could make as to what your services were worth.

Q. Do you care to say what those services were worth, in your judgment?

A. Services to the Union Land & Cattle Company?

Q. Yes.

A. Give me the length of time that has gone in on it.

Q. Exceeding four months constant time.

A. Well, I should think four months of your time, Colonel, ought to be worth the figures that Mr. Jones gave.

Mr. DORSEY.—That is our case. I would like to dispose of my case, if your Honor please, just this way: So far as this matter of compensation is concerned, it is a valuable thing to consider; that is what I am working at, my profession, and fees or compensation for services. If I get nothing I will not be discontented; I may not be entirely satisfied, but I will not be discontented. As to the propriety of charging these fees to the receiver, or against the funds in the hands of the receiver, there is not, I think the slightest conflict of authority. Every service rendered in behalf of property, for the benefit of the property, for its protection, service that is rendered by a man who sues the receiver, and protects property that belongs in equity to the creditors, one who defends a suit, one

who prevents dissipation of that property, aids all of the creditors, and is entitled to compensation from the funds of the creditors would not [45] otherwise get; he is conserving those funds and protecting the properties they are ultimately entitled to when converted into money. There is no conflict of authority on that notwithstanding what has been said. I find the courts have universally held even where a man injects himself into a case, if it subsequently appears it was for the benefit of the receiver, or for the benefit of the receivership funds, he is allowed his expenses, and allowed reasonable compensation for his services. That is all I ask. And I am not doing this for the receiver as such; I am not doing it for Mr. Moffat; what service I performed for Mr. Moffat as an individual was finished before I was employed by this company; I am glad, and I hope it will rebound to his benefit, and I am certain it will if we continue to prevail, I am certain he will receive more out of it, and I am certain the creditors will get more out of it if we do finally prevail; and I am positive the law is that that fund is responsible. Under the circumstances brought about, I am satisfied if some one had not represented this company at the time it was attacked, inevitably it would have gone into a speedy sale, which would have been a disastrous one; if somebody hadn't done it this property woud have been sacrificed. If somebody doesn't do it now, doesn't continue this, it will be sacrificed. When these gentlemen first came here, your Honor will

recall that they spoke with a great deal of elation and pride of the fact that they represented 85 per cent of the creditors. That representation subsequently dropped out the First Federal Trust Company; now they have left them about fifty, or less than fifty per cent; and if we can continue this until times are better, they won't represent ten per cent. And every man who is benefited and protected by saving this property will be willing to contribute his mite toward the payment of services [46] rendered. If the gentlemen think there are no authorities on that, I will call their attention to a good many in a very short time. Let me say one other thing I omitted to say. The Court itself is better informed than any witness that can be put upon the stand saving the man himself, who is prejudiced, who is biased in his own favor, to wit, the man who performed the service. The Court saw what was done; the Court sits as a conservator of these properties, and it is to the interest of the Court to see that the creditors are paid the utmost that can be obtained for them; the Court knows whether the services rendered were beneficial or not, at least it knows the amount of labor performed; and the Court can say I don't care to hear testimony, and fix the fee; that has also been decided by the courts.

The hearing was thereupon continued to Thursday, June 19, 1924, at 10 A. M., at which time it was resumed. [47]

TESTIMONY OF J. W. DORSEY, FOR INTERVENERS.

Mr. J. W. DORSEY, the witness, having been called to the stand by interveners, testified as follows:

Direct Examination by Mr. GREENE.

I appeared at numerous hearings in connection with this matter, those being the hearings referred to by me yesterday in the course of my examination. My answers and pleadings in the case will disclose the names of my clients. I was appearing for the same parties throughout the proceeding and there was no change in my representation until I was advised to act with the attorneys for the receiver, to appear for the receiver.

Q. And when occasion has arisen for you to state the parties for whom you were appearing, it goes without saying that statement is correct. I call your attention to the transcript of October 12th, at page 204. I can identify it, and save time perhaps, by saying that I read from page 204 of the transcript dated October 10th, 11th and 12th, 1923. (Reads:)

> "Mr. MANNON.—If your Honor please, before proceeding to do that, and on behalf of the various bank creditors whose indebtedness aggregates some twenty-two hundred thousand dollars [48] without interest, for whom myself and associates and Mr. Henley and his associates appear, I desire to consent formally to the

(Testimony of J. W. Dorsey.)

granting of the application of the First Federal Trust Company.

"Mr. DORSEY.—Now, if your Honor please, on behalf of the creditors, local creditors, whose claims aggregate $100,000 or more, and in behalf of myself, a creditor of the company, I oppose and object to the granting of this petition."

At the time that statement was made by you, Mr. Dorsey, you were acting, I take it, in behalf of the local creditors to whom that statement refers?

The WITNESS.—(Continuing.) Well, I was—I had been, and still am, employed by a number of those creditors; indirectly I have represented all of them. I had many discussions with them, and was authorized, both to speak for them and to act for them in their interests. I have acted for them in the sense that I have just stated. I am acting for them, but without direct employment; none of them have employed me at a fee or for compensation. My firm has been paid on account of that service not one cent by anybody on earth. Whether it is intended that the compensation which I am requesting here shall cover the services rendered by me throughout this proceeding depends on circumstances; I don't know yet what will happen; I have never said I will charge; never said I will not charge anyone else for services in connection with these matters. I performed a good deal of service long before I became attorney for the company, for which I may charge nothing. Whether an allow-

(Testimony of J. W. Dorsey.)

ance is made to me by the Court here will have nothing to do with it; it depends on how this matter terminates; if the affairs are wrecked, and their losses are complete, I shall charge nothing; if I succeed in [49] saving for them a large amount of the money they had invested here, I probably will charge something; that is a matter I have not yet determined.

Q. I show you, Mr. Dorsey, a letter, and ask you whether that letter was prepared under your direction, or sent with your approval? (Hands letter to witness.)

A. I think I never saw it; I think I had nothing to do with it; I think I never had any special discussion with anyone concerning its contents. I may be mistaken.

Q. The letter was never discussed with me, Colonel? A. This letter?

Q. Yes.

A. I think not. I don't recall; nothing here appears familiar. I did discuss with you some amendments to be made to the creditors' agreement of January 15th, I think, 1923, looking to a representation by a committee, Mr. Wingfield and Mr. Smith being that committee, and looking after the interests of the local creditors; to that extent I discussed it with you.

Q. In the letter which I show you, which is a letter addressed by W. H. Moffat to George Wingfield and W. T. Smith, dated Reno, Nevada, May 8th, 1923, this paragraph is contained: "These legal

(Testimony of J. W. Dorsey.)

services," referring to services performed by other than counsel for the receiver, "are said to have been performed during a time when the affairs of the company were in the hands of a receiver who was represented by a capable attorney, which attorney could and should have represented the company in its affairs and all legal matters affecting the company; and consequently all legal services performed by attorneys employed by creditors or outside parties should be paid for by the employers of such attorneys, rather than being made a charge against the company." [50] You don't remember, Colonel Dorsey, any discussion with me with reference to that paragraph, or the principle of law to which that paragraph applies?

A. I do not. If you recall some occasion, what we were discussing, it may be that something is familiar, but that is new to me.

The WITNESS.—(Continuing.) There are no circumstances in connection with my employment; I was simply asked to represent the company. With reference to the circumstances of my employment by the receiver, there were no other circumstances other than that I had been acting for the company here, I was familiar with the affairs of the company, and I assume that the Court thought perhaps I would be of some assistance, some aid to the attorneys for the receiver. I had no thought of representing the receiver as such until shortly—until after, well, I think it was after we had about concluded my brief, or our briefs; I think Mr. Cash-

(Testimony of J. W. Dorsey.)

man prepared two briefs in that case, and I one. I prepared the brief in appeal No. 4194—for that brief I am exclusively and wholly and entirely responsible. Mr. Cashman prepared the other two briefs. I don't remember when I was first employed by the receiver; I think it was some time during the month of March; I am confident of that but Mr. Cashman probably has a date in mind, or approximate date much better than I have. I was authorized by the Court to appear as attorney for the receiver. I was so authorized by an order of the Court; I had been informed prior to that time that my services would be acceptable. I was so informed by the receiver. It was not at a conference at all; it was concerning this matter. It was in my office, and we were talking generally about the affairs of this company. I haven't the faintest idea [51] what was said by me to the receiver at that time; I don't remember when it was; I don't remember what Mr. Smith said, or what I said; it is extremely probable I said that the receiver was represented by competent, capable men, and that maybe my services would be of no value, that probably my duty was to represent the company, and our interests in those respects were identical; both were trying to preserve the property for the benefit of the creditors. I remember at least that I did have a talk with Mr. Smith. At that talk the subject of my representation of the receiver was introduced—it was a formal introduction, I think probably Mr. Smith mentioned it. I did not seek it, and I cer-

(Testimony of J. W. Dorsey.)

tainly did not ask Mr. Smith if I might be made attorney for the receiver, one of the attorneys for the receiver. I am confident that Mr. Smith said to me that my services would be acceptable, or perhaps desirable. I didn't understand that Mr. Smith had any power to act for the receiver, I understood —he intimated to me that the Court would approve of my aiding and assisting the receiver in the preparation of briefs and the argument of the case before the Court of Appeals. Mr. Smith indicated to me that the Court would approve my employment as counsel for the receiver in those specific matters and asked whether I would accept the employment —I think it went as far as that. I don't know whether I said I would accept or not; it is entirely probable I said—Mr. Smith will recall better than I—that additional counsel might not be required, because I was representing an interest identical with that of the receiver. When I said that additional counsel might not be required, Mr. Smith did not assign any other reason in the world why one was required, that I can now recall, than that the court would like to have the benefit of my services, because I was familiar with the affair beginning [52] with the filing by the First Federal Trust Company of a petition for leave to sue the receiver and from that time on, I have been familiar with the questions that were at issue. In connection with these appeals, I was to give help along all lines which were involved in the appeals. I did not have any discussion with the receiver, or with anyone else, with

(Testimony of J. W. Dorsey.)

reference to the method of presenting these appeals. I presented them as I thought best. As to whether I had any discussion whatever with reference to the presentation of the charges of fraud and impropriety that had been made in the opinion of Judge Farrington—if you mean by discussion that I stated to him that I would make such charges, I did; Mr. Smith, however, did not ask me to, nor encourage me in doing it; that I did, and did because I thought it was proper to do it. I told Mr. Smith as I now tell you that I would make those charges and it is not improbable that I showed him some memoranda that I had made and some other matter I had written. I did not make the making of those charges a condition of my employment at the time. They were not in any way referred to in connection with my employment. During those discussions we discussed the Court's opinion frequently, and I approved it heartily, and expressed that view to Mr. Smith. I cannot tell you what Mr. Smith understood as to whether my brief would be prepared in support of the charges made in the opinion. I did not tell Mr. Smith what I would do. I had some interruptions because I had my other business affairs to care for and I worked just as hard as I know how to work to get this thing in order and I am sorry that I could not have done a better job. I did not commence my work upon any particular thing that I know of; this matter was brought to my attention that the company should be represented and I don't know whether [53] it was a

(Testimony of J. W. Dorsey.)

discussion with Mr. Cashman or whether I said so to Mr. Smith or whether Mr. Smith said so to me, that the company should appear in those two appeals. I don't know how the question arose. The orders in connection with this proceeding had not yet been made as I understand when those appeals were taken; and I think the order will speak for itself.

Q. I call your attention, Mr. Dorsey, to an order certified to by Mr. Patterson, dated March 17th, 1924, from which I read as follows: "The receiver herein is authorized to employ such additional legal assistance as he may think necessary, connected with the three appeal cases, to wit, No. 4194, No. 4195 and No. 4196, pending in the United States Circuit Court of Appeals for the Ninth Circuit, in which he as receiver is now interested as the appellee. Have you ever heard of that order?

A. I think I have; and it is probable that order that brought about the first discussion or suggestion by Mr. Smith to me that my services would be acceptable.

Q. Did you ever hear of another order dated March 26th, 1924: (Reads:) "J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals of the United States for the Ninth Circuit, with full authority to represent the receiver therein, to wit," and so forth. I won't read the rest of it because I am going to introduce this. Numbers 4194, 4195 and 4196. Are you cognizant of those orders?

(Testimony of J. W. Dorsey.)

A. What is the date of that order, Mr. Greene?

Q. March 26th, 1924.

A. I think that is the order that I saw, and the order that came to me, or a certified copy of it.

Q. Did you request any orders of that sort should be made? [54]

A. I did not.

Mr. GREENE.—I will offer those two certified copies in evidence, if your Honor please, and ask that they be given appropriate exhibit numbers.

The COURT.—They will be admitted.

Mr. GREENE.—That is all.

The COURT.—(Q.) Did you send me a copy of your brief, Mr. Dorsey, before the last order was made, do you remember?

A. I did not. I sent you a part of my brief, but I don't remember whether I had concluded that brief before I had an opportunity to send it to you or not.

Q. You sent me a part of your brief before the second order was made?

A. Yes, sir, I did that, and I made some corrections subsequently.

The COURT.—That is all.

The order dated March 17th, 1924, is marked Creditors' Exhibit "A"; the order dated March 26th, 1924, is marked Creditors' Exhibit "B"; and read as follows:

CREDITOR'S EXHIBIT "A."

In the District Court of the United States, in and for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant.

The receiver herein is authorized to employ such additional legal assistance as he may think necessary, connected with [55] the three appeal cases, to wit, No. 4194, No. 4195 and No. 4196, pending in the United States Circuit Court of Appeals for the Ninth Circuit, in which he as receiver is now interested as the appellee.

E. S. FARRINGTON,
District Judge.

Dated March 17th, 1924.

[Endorsed]: No. B–11. In the District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Order Authorizing Receiver to Employ Additional Legal Assistance. Filed March 17th, 1924. E. O. Patterson, Clerk.

CREDITOR'S EXHIBIT "B."

In the District Court of the United States, in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant.

J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals of the United States for the Ninth Circuit, with full authority to represent the receiver therein, to wit:

First Federal Trust Company (a Corporation), and Milton R. Clark, as trustee under and by virtue of that certain deed of trust or [56] indenture dated, September 1, 1916, executed by Union Land and Cattle Company (a corporation), to First Federal Trust Company (a corporation), and Milton R. Clark, trustees, Appellants, vs. The First National Bank of San Francisco (a corporation), and Union Land and Cattle Company (a corporation), and W. T. Smith, receiver of said Union Land and Cattle Company (a corporation),

under and by virtue of that certain order given and made on July 28, 1920, Appellees, No. 4194.

The First National Bank of San Francisco, a corporation, Appellant, vs. Union Land and Cattle Company, a corporation, and W. T. Smith, Receiver of said Union Land and Cattle Company, under and by virtue of that certain order given and made on July 28, 1920, Appellees, and Old Colony Trust Company, a corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a national banking association, The First National Bank in St. Louis, a national banking association, National Shawmut Bank of Boston, a national banking association, and First National Bank of Chicago, a national banking association, Appellants, vs. Union Land and Cattle Company, a corporation, and W. T. Smith, Receiver of said Union Land and Cattle Company, under and by virtue of that certain order given and made on July 28, 1920, Appellees, No. 4195.

The First National Bank of San Francisco, a corporation, Old Colony Trust Company, a corporation, the First National Bank of Boston, a national banking association, National Bank of Commerce in New York, a national banking association, The First National Bank in St. Louis, a national banking association, National Shawmut Bank of Boston, a national banking association, National City Bank, a national banking association, and First National Bank of Chicago, a national banking association, Appellants, vs. W. T. Smith, Receiver

of the Union Land and Cattle Company, a corporation, under and by virtue of that certain order given and made on July 28, 1920, Appellee. No. 4196.

Dated this 26th day of March, 1924.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. B–11. U. S. District Court, District of Nevada. The First National Bank of San Francisco, a Corporation, Plaintiff, vs. Union Land and Cattle Company, a Corporation, Defendant. Order Appointing Additional Counsel. Filed March 26, 1924. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

Mr. GREENE.—I have taken it for granted, Mr. Dorsey, that your case is submitted; that is, that your have put in the affirmative matter in your petition here?

Mr. DORSEY.—I would like to call one more witness before I conclude.

Mr. GREENE.—Excuse me, you come first then.

Mr. DORSEY.—I would like Mr. Belford to take the stand. [57] This is sort of a second thought.

TESTIMONY OF SAMUEL W. BELFORD, FOR APPLICANTS.

Mr. SAMUEL W. BELFORD, called as a witness by applicants, having been duly sworn, testified as follows:

The WITNESS (on Direct Examination by Mr.

(Testimony of Samuel W. Belford.)

DORSEY).—I have been familiar with the affairs of the receivership since the appointment of Mr. Smith. I think that I have been in court each time that Mr. Dorsey has been in court since these controversies arose, beginning in May, 1923. I know what services were performed by Mr. Cashman and what services were performed by Mr. Dorsey.

Q. What, in your judgment, is the value of those services?

A. I think they have a very great value, Colonel Dorsey; I would say anything between—

Mr. GREENE.—If your Honor please, we offer the same objection we made to the other testimony, on the ground that any allowance to counsel for the company under the circumstances in this case is obviously improper.

The COURT.—Objection overruled.

Counsel for the interveners thereupon excepted to said ruling of the Court and hereby assign said ruling as Interveners' Exception No. 3.

A. I would say, Colonel, from what I know of that controversy, that your services ought to be worth at least ten thousand dollars, and possibly more. If they had been rendered for me as a private client, and I had the money to pay for them, I would pay more than that. [58]

Cross-examination by Mr. GREENE.

The WITNESS.—(Continuing.) Assuming that Mr. Dorsey's services had been rendered in behalf of Union Land and Cattle Company, certain cred-

(Testimony of Samuel W. Belford.)

itors, but not all of the creditors, I certainly would feel that the service to the company was of the amount that I have named. Colonel Dorsey represented the Union Land and Cattle Company; his services for the Union Land and Cattle Company were directed to the preservation of the estate of the Union Land and Cattle Company; the preservation of the estate of the Union Land and Cattle Company may have been the salvation of the creditors of the Union Land and Cattle Company, so I say that his services were worth more than what I have suggested. In May or June, I am not sure, 1923, through the First Federal Trust Company and the First National Bank of San Francisco and through the banks that you are now representing, an effort was made in this court to require the receiver to turn over to the First Federal Trust Company for immediate sale all of the mortgaged lands of the Union Land and Cattle Company; following that or coincident with it, an effort was made by the banks to require the receiver to sell at forced sale, in the language of your petition at a forthwith sale, all of the unmortgaged, assets of the Union Land and Cattle Company. That meant in my mind the absolute destruction of the estate of the Union Land and Cattle Company. It meant that there should be offered at public auction something like 80,000 head of livestock under the hammer; it meant that there should be offered at public auction 226,000 acres of land; it meant that the land was to be stripped of its cattle; that instead

(Testimony of Samuel W. Belford.)

of selling these assets as going concerns, they were to be sold separately under forced sale. Mr. Moffat testified that the shrinkage in the value of the estate would amount to not less than a [59] million six hundred thousand dollars. Mr. Petrie testified that such a program would involve a loss of at least 75 per cent in the value of the land; so that the controversy there was whether or not this plan should be put through, meaning a sacrifice of at least 75 per cent of the value of this property. That was the thing that was in issue, and that being in issue, considering the part taken by Colonel Dorsey in the representation of the Union Land and Cattle Company, is what I base my opinion on; and I desire to reiterate if he were representing me, and I had the financial ability to pay, I would not hesitate to pay a great deal more than ten thousand dollars. In all the steps which I have referred to, I took the same view, and Judge Brown took the same course of procedure that Colonel Dorsey did. Judge Brown and I consider that we did all that we could and we consider that Colonel Dorsey and his firm did all that they could. I think that we in our capacity as the representatives of the Court took exactly the same attitude with reference to matters to which I have adverted that was taken by Colonel Dorsey. I expect to be paid for my services out of a fund as the representative of the Court, whatever the circumstances. I expect to be paid as you (referring to Mr. Greene) are paid, and every other lawyer is paid;

(Testimony of Samuel W. Belford.)

we have to live, pay office rent, and we have to get along in this world the best we can; the only thing we have to sell is our labor and our services and I expect to be paid just as you are. I think that it would be a very difficult matter to determine as to whether there was any original contribution to the program which I have just referred to, by Colonel Dorsey and his associate. During these hearings here, we were consulting all the time as to the propositions of law that we thought were involved and the propositions of law that ought to be presented to the Court. [60] I could not say, I would not undertake to say who originated anything. We were co-operating throughout in an endeavor to save this estate from the destruction we thought would follow the granting of the relief asked for in your (referring to Mr. Greene) petition, and we were also co-operating in opposition to the petitions filed at various times by the banks and by the First Federal Trust Company. In connection with the preparation of briefs in the Circuit Court of Appeals, Colonel Dorsey and ourselves did not collaborate as we did as a general principle throughout the year that has just elapsed. I didn't have a chance to do it. When we were getting to the point of the preparation of the briefs, I commenced the writing of the briefs in all these cases, and I completed the first draft of these briefs, I believe in March, early in March. I had to go to Washington to look after a case that was set for argument there on the 14th of March, and the briefs were

(Testimony of Samuel W. Belford.)

left with Judge Brown when I left for Washington, so that such additions might be made to them and such rearrangement might be effected as was made necessary by the briefs filed by your firm and by Mr. Jones' firm. I had no opportunity to consult Colonel Dorsey with reference to those briefs at all. Colonel Dorsey was not associate counsel for the receiver when I was working on my brief. I was working on my brief on March 9th. I think I left here either March 9th or March 10th. Colonel Dorsey and I were not co-operating except in this way and I am not even sure of this, but my best recollection is that before I went to Washington, I wrote to Colonel Dorsey and Mr. Cashman, enclosing them an outline of the argument that was to be contained in the briefs. That was not to be a joint brief filed by me and Colonel Dorsey—it was not, not at all; it was a brief that I intended [61] to file, or rather, my firm. The reason that we and Colonel Dorsey filed separate briefs although we jointly represented the receiver was that because at the time of the preparation of this brief, I did not know about Colonel Dorsey representing the receiver. I didn't know of the appointment of Colonel Dorsey at the time the appointment was made. It was on my return from Washington, about the 22d or 23d of March, 1924, that I was first advised of that appointment. I naturally had some discussion with the receiver with reference to the preparation of those briefs. I don't know how I can outline what that discussion was. I

(Testimony of Samuel W. Belford.)

talked with Mr. Smith concerning the preparation of the brief; I think we went all over the subject. Nothing in particular was a point of issue in the discussion except in this way; I told Mr. Smith as nearly as I could recall it that in my judgment the case was going to turn on certain propositions of law. I can simply summarize this because I would not undertake to say what our conversation was. As to the First Federal Trust Company, that there was no default, that this was not such a receivership as was contemplated by the deed of trust; that the receivership was a matter in which the First Federal Trust Company had actively participated; that it was a party to the receivership; that it was a remedy suggested by the First Federal Trust Company for the benefit of itself and everybody else; that even if a default existed it had been waived by the acceptance of the payments of principal and interest; that the First Federal Trust Company was estopped to assert a default, even if such a default existed. So far as 4195 was concerned, that was the petition of the banks, I told Mr. Smith that was a matter which, as I understood the law, rested in the sound discretion [62] of this Court; that the plan proposed by the banks represented sheer destruction of this estate, as we saw it, and that I didn't believe any Court ought to order that sort of liquidation. Now, those were the discussions that I had with Mr. Smith; and I think I left Mr. Smith with an outline of the argument that I intended to follow. There was some

(Testimony of Samuel W. Belford.)

discussion with Mr. Smith as to my attitude with reference to the findings of fraud against the various banks that were involved. I will state the substance of those discussions. I told Mr. Smith that, as I viewed this case, the fraud ought to be placed —I won't say fraud, I didn't use that word. Let me see if I can tell you what I did say: That the duplicity or bad faith of bringing this proceeding, in my judgment, should be placed squarely upon the present management of the First National Bank and the First Federal Trust Company, and that that was what I was going to contend for in the discussion of that question; that they were parties to the receivership; they knew all about the receivership, and having participated in it, having taken its benefits extending over a period of nearly three years, that I thought they were guilty of the worst sort of bad faith and unconscionable conduct. I don't know whether Mr. Smith agreed to that method of presentation or not. I simply told him I was going to present it. Incidentally that was what the Circuit Court of Appeals found and said in its opinion as to their conduct; the facts admitted of no doubt. I don't think Mr. Smith ever had any discussion with me with reference to the presentation by me or my office of the findings of fraud by his Honor, Judge Farrington, in his opinion so far as that presentation was to be made to the Circuit Court of Appeals, except in the way I am telling you. My recollection is that I told Mr. Smith that, in my judgment, [63] the record

(Testimony of Samuel W. Belford.)

showed that the First Federal Trust Company and the First National Bank were guilty of bad faith of the worst sort. We were discussing the plaintiffs in this case, or the petitioners in this case. We thought they were all together, all sleeping in the same bed. I don't know whether there was unanimity so far as I and Mr. Smith were concerned upon the question of presentation, I could not tell you. I don't know whether you would call it lack of unanimity or not; I simply stated what my argument was going to be. I think there was no criticism or objection from those to whom I owe my employment in connection with that presentation. My client was Mr. Smith. There was no objection to that. I told them frankly what I was going to argue on the argument. I was not requested to argue in favor of any findings of fraud. I told Mr. Smith what I was going to argue; I told Judge Farrangton what I was going to argue; I gave them an outline of my argument, as to what that argument was to be, and that argument was set out. I told Judge Farrington, as I recall the conversation, that I would regard it as an entirely proper matter on his part to select counsel to argue this case on a line different from my own. I did not have a discussion with Judge Farrington, which resulted in my suggesting to him that he employ counsel. I had a discussion with Judge Farrington in which I suggested that I would regard it as a matter of entire propriety that other counsel should be employed. I happened to make that suggestion to

(Testimony of Samuel W. Belford.)

him because I told him what I was going to argue. As to whether the suggestion that other counsel should be employed was a necessary corollary to my stating to him what I proposed to argue, I have no objection to answering. I don't know whether it was or not. I told Judge Farrington that he was entitled to know the position I would take in the [64] argument of these cases; and as I recall, I left Judge Farrington an outline of that argument; and my judgment of this case was that the bad faith of this proceeding should be placed upon the management of the First National Bank and the First Federal Trust Company, the present management; and that Judge Farrington would not be overstepping the bounds of propriety, in my opinion, if he selected counsel to argue any other theory of this case. Judge Farrington did not advise me with reference to his attitude on this matter. I never saw Judge Farrington again until after my return. I don't recall that Judge Farrington criticized me at all for my attitude as above outlined.

Redirect Examination by Mr. DORSEY.

The WITNESS.—(Continuing.) I stated my conviction and my opinion and my sense of injustice committed by someone to the officers, or some of the officers, of the First National Bank and the First Federal Trust Company. I not only stated that to Mr. Smith, but stated it to Mr. Avenali and I think I stated it to Mr. John A. Hooper. I did not state it in effect; I said it directly and specifically, there wasn't any effect about it. I told them

(Testimony of Samuel W. Belford.)

that, in my judgment, the bad faith of the First Federal Trust Company was due to the present management of the First Federal Trust Company.

The WITNESS.—(Continuing Under Examination by the Court.) As to whether I was informed by the Court before Mr. Dorsey was actually employed that it was in contemplation, and that the order would be made, I think that Judge Farrington and I had a conversation over the telephone; I am not clear about this but it is my best recollection, in which he stated he had appointed Colonel Dorsey, and I said that was satisfactory. [65] I think that was subsequent to my return from Washington. I think the same day or the next day.

TESTIMONY OF GEORGE S. BROWN, FOR INTERVENERS.

GEORGE S. BROWN, a witness called by the interveners, testified as follows:

The WITNESS (Under Direct Examination by Mr. GREENE).—I was not present at the conference to which Mr. Belford referred with Judge Farrington; nor at any conference with reference to the treatment by counsel for the receiver of the briefs in connection with these appeal matters. I was present at some of the conferences between Mr. Smith and Mr. Belford with reference to the presentation of those appeals. At those conferences there was reference to the treatment to be given the matters to which we have been referring here

(Testimony of George S. Brown.)

on the appeal along the lines that Mr. Belford has stated. At such conferences, there was no suggestion of a desire on the part of anyone that findings of fraud in the opinion should be upheld in connection with the presentation to the Court of Appeals, nor was there any suggestion of that sort elsewhere; so far as I am concerned, that matter was not a subject of conversation between me or any of the people for whom I may have been acting in this matter.

Mr. DORSEY.—I think all I have to say is that I realize the need for economical administration of the affairs [66] of this receivership; I know every dollar that is spent is a dollar taken from the creditors. I think that every man who labors for the benefit of the receivership should receive some reasonable compensation, but it should not be excessive; it should be borne in mind always that this company is poor, that it is not able to pay all of its debts, and I think everybody should be content to receive a bit less than he would ask if he was working for a wealthy client. I say that particularly in view of the fact that we have applied for compensation; and I would like the Court to understand that all we ask for, and whatever conclusion the Court should come to, if it should think we are entitled to anything in any capacity, all we ask for is a very reasonable or very moderate compensation considering the services we have rendered. I say that for one reason because of what was said here at the time the effort to return the properties

to the company failed. I know that it came before this court, and went out before the people interested, that the people who were to take over the management, who elected themselves, or had themselves elected officers of the corporation, saddled at once upon the company a very large sum of money, in the aggregate something like $100,000 or more. I know that some of those fees were large, and were fees asked for services rendered solely and wholly for creditors, and not for the company; solely and wholly to put the company in the hands of the men who sought to control it, and not in the interests of the company, I believe. I know that Mr. Moffat, who was president of the company, objected to the allowance, or the consideration of allowing any such sums of money that were demanded; and I know that he has had in mind always that whatever is done here should be done at the least overhead, the least possible expense, and all in the interest of the company, of this receivership. And [67] feeling as I do toward Mr. Moffat, and knowing the condition of this company, I ask the Court, if it gives us anything at all, to consider that view. All we ask and all we want is a very moderate compensation for services.

Mr. GREENE.—Are you now asking for compensation for services rendered to the receivership or not?

Mr. DORSEY.—I have presented my views on that.

Mr. GREENE.—You filed a petition first asking

for compensation; you then asked to have that part stricken, and I understand now you are asking for it. I want to get clear whether you are or are not asking.

Mr. DORSEY.—I am asking the Court to allow us for services performed. Upon what ground he makes that allowance is for the Court to determine. I am confident any service rendered for properties in the hands of a receiver, that tends for the benefit of those properties, and for the benefit of the creditors, is entitled to compensation. That is my view, and I think I would be entitled to ask for fees as attorney for the company, and that I would be entitled to ask for fees if I, a creditor of this company, should come in without being asked, and should force my way into the litigation, and it should result in saving to the creditors large sums of money, or benefit the estate, and would be entitled to have back my expenses, and a reasonable compensation.

Mr. GREENE.—Am I correct in understanding that you do not urge the allowance to yourself as counsel for the receiver?

Mr. DORSEY.—You are not correct in anything you have said concerning that subject. I am asking for compensation for services performed. The services I performed primarily for the company; if I did anything in aid of the receiver, it was because [68] the receiver and I were in accord with this phase of the matter. Both of us wanted to conserve these assets; both thought these prop-

erties would be taken away, and would be utterly destroyed; we were working together; whatever he said to me was for the benefit of this company; whatever I said to him was for the benefit of the receivership; what we discussed, my aim and his, was to benefit the creditors; and I said to you yesterday, your creditors as well as mine.

Mr. GREENE.—Am I to understand that the request or motion you made eliminating from your petition any request for compensation to you on account of services to the receiver, stands as an elimination, or that you desire it restored?

The COURT.—I want to say now I am responsible for the appointment of Mr. Dorsey, and I feel that he rendered very valuable service, and my intention is to make an order compensating him for his services. Of course if he refuses to take the money that is his affair; but he has rendered the service at the request of the receiver and at my request, and we are in duty bound to remunerate him. That is the way I look at it, and I feel he has rendered valuable service. Of course if he and his associate refuse to take the money, I have no way of compelling them to take it if they don't want it.

Mr. GREENE.—I suppose, if your Honor please, it is unnecessary, but probably not out of order, for me to say we object to the making of an order of that character.

The COURT.—That don't convey any information to the Court. Of course, you can make your

objection and take an exception when the order is made.

Mr. GREENE.—Would your Honor permit me, in order to shorten the time, to file at the commencement of the afternoon [69] session a formal objection to the making of the order? I think it will save time.

The COURT.—I said plainly that was my view of the matter, and the order would be made allowing compensation, because Mr. Dorsey had rendered exceedingly valuable services to this estate, and had rendered them at the request of the Court, and on the order of the Court, and at the request of the receiver. Mr. Belford coincided with that view, and my reasons for employing Mr. Dorsey and Mr. Cashman I will give. If you object to the written statement, I certainly will not make it; I will make the order. [70]

Mr. GREENE.—I think the objection from the point of view of the parties whom I represent to the making of such an order is clear, and in order that there won't be any misunderstanding about it—

The COURT.—You may take all the time you want to prepare objections and exceptions. You can make them this afternoon or make them down below and send them up here later.

TESTIMONY OF W. T. SMITH, FOR APPLICANTS.

Mr. W. T. SMITH, called as a witness under examination of the COURT.

The WITNESS.—I received the letter just handed to me and am acquainted with the signature at the bottom of it. That signature is Mr. Spreckels'.

The COURT.—That may be marked for identification. I may not use it, but if counsel wish to examine the letter they may do so.

The letter was thereupon admitted in evidence by the Court without objection by any of the parties, and was in the following words and figures, to wit:

"Rudolph Spreckels
First National Bank Building
San Francisco.

January 13, 1922.

Mr. W.T. Smith, Receiver,
Union Land & Cattle Co.,
Reno, Nevada.

Dear Mr. Smith:

Your letter of January 10th received and frankly I was disappointed to find that you are not in a position to submit an outline of the company's financial situation.

It seems to me very important to keep accounts sufficiently up-to-date to enable you to know very closely the result of each month's operations. The

Creditors Committee will have a representative here in a few days with full power to act and to cooperate with me. The committee have come to [71] the conclusion that we might as well call the creditors' agreement off and to take immediate steps to secure control of the company's affairs or failing in that to petition the Court for an order to sell the properties.

The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by actual purchase of the properties at foreclosure sale. I know there will be no change from this determination and I would very much prefer to see matters arranged by agreement than to have the situation aired in court.

If you can be in San Francisco early next week, I believe we could quickly arrive at some settlement satisfactory to all.

I feel I owe it to you to be very frank about these matters and trust you will agree that I am right in thus presenting matters to you.

Yours very truly,

R. SPRECKELS."

TESTIMONY OF W. T. SMITH, FOR APPLICANTS (RECALLED).

Mr. W. T. SMITH, recalled by the applicants as a witness, testified as follows:

Direct Examination by Mr. DORSEY.

The WITNESS.—I was responsible for your employment.

The WITNESS.—(Continuing—Under Cross-examination by Mr. GREENE.) The circumstances under which I employed Mr. Dorsey were as follows: When the litigation first commenced here in regard to the Union, I told Judge Farrington, and I also told Brown & Belford, that I thought the Union should be represented by some attorney, and Mr. Dorsey and Mr. Cashman were more or less familiar with the thing here in San Francisco, and I told them the circumstances, and I thought the Union Land and Cattle Company as a corporation should be represented in this sort of thing; and I said to them, the Union has no money, it has no way to raise any money, I don't [72] know as you will ever be paid for the work you are doing now, but if it has to be done some of us will have to go down in our pockets and dig it up; and they went on with the work. Then when you filed these suits here of the First Federal Trust Company and the banks, I told Judge Farrington at that time I thought we should have additional counsel to represent the receiver; he agreed with me. I went

(Testimony of W. T. Smith.)

to San Francisco, and I think Judge Farrington made an order giving the receiver permission to employ additional counsel. I went to San Francisco, and I talked to Mr. Dorsey and Mr. Cashman about the thing, and they were willing to undertake it; the question in their minds was whether it should be undertaken as being employed by the receiver, or whether it should be done for the Union Land and Cattle Company; it was finally decided that they should be employed for the receiver; and in some manner, I don't know how, I communicated with Judge Farrington, and he issued an order that I could employ Mr. Dorsey and Mr. Cashman as attorneys for the receiver. I am a stockholder of the Union Land and Cattle Company and it was first determined by me that the Union should be represented at the initiation of the entire proceeding, as I remember, when the proceedings were first commenced towards liquidation. I can't tell you the date, but I mean in the spring of last year, some time ago. I took the following action towards securing the employment of Mr. Dorsey at that time: I was in San Francisco, and I told Mr. Dorsey, after consultation with Judge Farrington and with Brown & Belford that I thought the Union Land and Cattle Company as a corporation should be represented in these proceedings, and then I talked to Mr. Dorsey and Mr. Cashman about it and said what I have told you. It was not my understanding that in the spring of last year [73] Messrs. Dorsey & Cashman were rep-

(Testimony of W. T. Smith.)

resenting me as receiver, not until the filing of the petitions for liquidation. Then for the first time I went and employed Messrs. Dorsey & Cashman to act for the Union Land and Cattle Company, in my capacity as receiver. That is the first time. I don't know what the date was. I gave no notice of that to any party to the proceeding. I only told the Court I thought it should be done, and Brown & Belford. It wasn't any secret; I just told them I thought the Union Land and Cattle Company as a corporation should be represented in these proceedings, and that is the reason why I spoke to them. I had no authority from the Court, no authority from anybody, just simply a personal matter that was. It was not about that that I spoke to Judge Farrington, and he gave me authority—that was in regard to the receivership. I didn't say that when I approached Dorsey & Cashman last spring with reference to an employment of them by the Union Land and Cattle Company, that I did so as receiver. I only talked to them and told them I thought somebody should be employed to represent the corporation, the Union Land and Cattle Company; and probably what I said to them was not in the nature of receiver's authority, but perhaps in the nature of stockholders, if you want to put it that way; that wasn't intended to bind or involve the receiver in any sort of way. I was receiver at that time and I suggested that to them at that time, but not as receiver, at least I did not so intend it. It is not my under-

(Testimony of W. T. Smith.)

standing that by my action taken in the spring of 1923 I in any way committed the receivership to the payment of any disbursements on account of any services that they might render from that time on. I feel entirely free from obligation as far as the receiver is concerned at that time; I had [74] no authority to do it. What prompted me to reach the conclusion that the Union should be represented by Mr. Dorsey and Mr. Cashman was because the Union Land and Cattle Company was a corporation, it was not extinct, and as long as proceedings in court were going on, which might affect the stockholders of the Union Land and Cattle Company, I thought somebody should represent the corporation. The stock of my son-in-law, Charles B. Henderson, has passed out of his hands. I can only tell you that my action taken in the spring of 1923 was taken as an individual, trying to see my way clear to do my duty to the Union Land and Cattle Company, for which I was receiver. When I consulted Messrs. Dorsey and Cashman in 1924, it was after proceedings were commenced for the foreclosure of the mortgage, and the application of the banks for the sale of the property, whatever time that was. I could not tell you whether I had occasion to talk with Messrs Dorsey and Cashman, it was about August, 1923, with reference to employment—I don't remember that. Assuming that the petitions of the banks were filed in August, 1923. I consulted with Messrs. Dorsey and Cashman with reference to

(Testimony of W. T. Smith.)

their representation of me as receiver, after those suits were commenced. I should say it was immediately after. The nature of my consultation with them at that time was that I had talked to Judge Farrington and had advised that additional counsel be employed to represent the receiver before the appellate court, in proceedings before the appellate court. I did not understand that my conference at that time amounted to an employment of Messrs. Dorsey and Cashman—not in the beginning, but afterwards I had authority to do it, then they were employed. I can't give you the dates, except as you have them in the papers; I don't [75] remember the dates. To the best of my recollection, they were employed to represent the receiver almost immediately after the filing of the applications of the banks for foreclosure of the property. I think they only represented me as receiver until the case was decided in the appellate court. I talked to the Judge about the employment, and I think Brown & Belford knew it; I don't know whether they did or not, I have forgotten now. Messrs. Dorsey and Cashman were employed to appear for the receiver in the proceedings before the appellate court—before the Circuit Court of Appeals. Messrs. Dorsey and Cashman were not employed by me until the suits were brought and an appeal was taken to the appellate court, or whatever you call it, the United States Circuit Court of Appeals; then they were employed to represent the receiver in the hearing be-

(Testimony of W. T. Smith.)

fore the United States Circuit Court of Appeals. They were not employed to render services before the District Court. As I stated, I went there in the first place after these suits were commenced. I came over and conferred with the Judge and told him I thought we should have additional counsel and I went to San Francisco—he made an order, his order is in Reno, I haven't it here, that I could use my own judgment, if I remember correctly, as to the employment of counsel. I went to San Francisco and talkel to Mr. Dorsey and Mr. Cashman, told them the circumstances, and asked them if they would take it up; they replied that they would and then the Judge issued an order authorizing me to employ them. What prompted me to employ other counsel was because I thought it was necessary, the importance of the suit that we should have additional counsel. I was not in the least dissatisfied with the services of Brown & Belford. What I expected to gain by the employment of other counsel was just [76] additional heads to try to present the case properly before the court in San Francisco. I suppose I did have some discussion with Mr. Dorsey and Mr. Cashman with reference to the handling of the case. I don't remember whether I had any discussion with reference to the method which they were to employ in treating the findings of the District Court with reference to the various banks. I don't remember discussing any matter of that sort. I don't remember any particular discussion in regard to

(Testimony of W. T. Smith.)

that; I don't remember that I did not discuss that subject. At the time I employed Messrs. Dorsey and Cashman, there was no discussion with reference to compensation. I did, however, as I have stated to you, have a conversation with them at the time I discussed this matter with them in May of 1923, with reference to compensation. I think the language I used was that the Union itself had no money, and that if the fee had to be paid some of us would have to go down in our pockets and dig it up. I certainly understood that I was obligated to do that in case it was not paid from other sources. My action in employing Messrs. Dorsey and Cashman in connection with the Circuit Court of Appeals was taken after consultation with the Judge. In the beginning, in regard to the Union Land and Cattle Company, I was responsible for that employment, and not anyone else; in the latter instance, I talked with Judge Farrington about it and told him what I thought; and I think in the first instance, I talked to Brown & Belford about Union Land and Cattle Company being represented.

The WITNESS.—(Continuing—on Redirect Examination by Mr. DORSEY.)

Mr. DORSEY.—(Q.) Mr. Smith, I understood you to say a moment ago that you would regard yourself as responsible for the [77] fee for services performed for the Union Land and Cattle Company under the employment of about May, 1923?

(Testimony of W. T. Smith.)

A. I don't remember the date, Mr. Dorsey.

Q. You state you regarded yourself as responsible? A. Yes.

Q. Do you remember that I told you I would not hold you responsible? A. I think I do.

TESTIMONY OF J. W. DAVEY, FOR APPLICANTS.

Mr. J. W. DAVEY, a witness called in behalf of applicants, having been sworn, testified as follows:

Direct Examination by Mr. DORSEY.

The WITNESS.—In 1920 I was connected with Union Land and Cattle Company, being director and secretary of the company at that time. I remember two agreements, called respectively creditors' and trust agreements, dated about May 1, 1921, I am not sure about the dates. I know Mr. Joseph Hooper who was a director in my corporation. He was an officer, either of the First Federal Trust Company or the First National Bank; as I understand it, under the trust deed the First Federal Trust Company is entitled to a representative on the Board of Directors of the Union Land and Cattle Company, and Mr. Hooper was on the Union Land and Cattle Company Board of Directors as a representative of the bank. The agreements of May 1, 1921, were presented to the Union Land and Cattle Company.

Mr. GREENE.—May I ask, Mr. Dorsey, I don't want to cause needless waste of time, what the materiality of this is?

(Testimony of J. W. Davey.)

Mr. DORSEY.—I understand your inquiries to be directed to establishing in some manner that there was no occasion for criticizing anybody connected with this litigation or with this receivership of wrongdoing or fraud; that was the purpose of your question, as I understand it, and I want to show you what was [78] done, and I want to establish here what was done that caused the Union Land and Cattle Company, its officers and its attorneys, and I suppose the Court, to believe that ugly things were at work on behalf of the creditors.

Mr. GREENE.—I don't understand there is any such issue before the Court, and I object to it as immaterial on this application. [79]

Mr. GREENE.—Colonel Dorsey, your application was for compensation as an attorney who had been employed to represent the receiver; we could not see any reason for that employment except to do something that other counsel in the receivership were not willing to do, and it seemed to us it was not proper to penalize the creditors as a whole for such employment. Now if the suggestion and that contention involves going into matters which seem to me not germane, I certainly am not going to take a position of attempting to block investigation along any line the Court or you [80] wish to have followed. You can go just as far as yau want.

Mr. DORSEY.—What is the last question?

(The reporter reads the question.)

WITNESS.—They were presented to the Union

(Testimony of J. W. Davey.)

Land and Cattle Company for the purpose of getting the corporation to consent to the agreement.

Mr. GREENE.—Your Honor will appreciate I have made an objection here, and you have overruled it [81]

Mr. GREENE.—I have, your Honor, voiced an objection to that question.

The COURT.—The objection is overruled.

Counsel for the interveners thereupon excepted to the Court's said ruling and said exception is hereby assigned as Interveners' Exception No. 4.

The WITNESS.—(Continuing.) My recollection is that the said agreements of May 1st, 1921, were brought here by Mr. Hooper. There were four directors of the Union Land and Cattle Company present at that meeting, namely, Mr. Moffat ,Mr. Smith, [82] Mr. Hooper and myself. Mr. Moffat and I didn't know all of the contents of these two agreements; up to that time we had talked to each other about it, but at the time the meeting was being held, we asked some questions about it. During the conference Mr. Hooper made a statement that if the Union Land and Cattle Company did not agree to those agreements that they, meaning probably the Bank, would have to take over the property. Mr. Smith made a statement to Mr. Hooper at that time, that he thought Mr. Hooper was not justified in making such statements as that, and he didn't want to hear any more from him along that line. The meeting proceeded, the resolution was passed authorizing the signing of the agree-

(Testimony of J. W. Davey.)

ments by the corporation. I know P. S. Scales, a gentleman connected either with the First National Bank or the First Federal Trust Company. I don't know if he is an officer in either of those banks; I always understood he was a representative of the bank or a representative of Mr. Rudolph Spreckels, or of both. Mr. Rudolph Spreckels was the president of those banks at that time. I had a discussion with Mr. Scales about the signing of the agreement.

Q. What was that conversation?

Mr. GREENE.—Object to the question along the same line; also not binding on those whom I represent.

Counsel for the interveners thereupon excepted to the said ruling of the Court and hereby assign said exception as Interveners' Exception No. 5.

The WITNESS.—(Continuing.) Mr. Scales approached me for the purpose of having me, as a creditor and stockholder, sign the [83] creditors' and stockholders' agreements; I told him I wasn't in accord with any plan that placed the entire management of the company in the hands of Mr. Spreckels for the Bank in San Francisco, and that I didn't feel like signing those agreements. He told me at that time that if I didn't sign those agreements, it would become necessary for the Bank to take over the property, and that myself, together with the rest of the creditors, would not receive fifty cents out of the dollar on our claims. Nobody was present at this con-

(Testimony of J. W. Davey.)

versation. I remember where it was, yes; I don't remember the exact date. I was occupying a room on the third floor of the Reno National Bank Building, and Mr. Scales called on me in that room. I don't remember the exact date now, but it was along about the time—it was just following this meeting of the Union Land and Cattle Company, when the consent was given to sign the agreement. It was during the period when that first stockholders' and creditors' agreement was in circulation for signature.

TESTIMONY OF W. H. MOFFAT, FOR APPLICANTS.

Mr. W. H. MOFFAT, called as a witness for applicants, having been duly sworn, testified as follows:

The WITNESS. (Under Direct Examination by Mr. DORSEY.)—In 1921 I was president of the Union Land and Cattle Company. I remember the time when the first creditors and stockholders and trust agreement, of date May 1, 1921, was presented to the company, or certain of its officers, for execution. Such presentation was made by Mr. Joseph G. Hooper, who was connected with the First National Bank and the First Federal Trust Company of San Francisco. The matter of signing that agreement was discussed a little *pro* and *con*, just for a few moments; it was talked over, yes; we talked [84] about it. As far as I can remem-

(Testimony of W. H. Moffat.)

ber, Mr. Smith and Mr. Davey and Mr. Hooper and myself were present. I don't remember whether there was anybody else present or not, but I know the four named were.

It was ordered that interveners might be deemed to have the same objection, overruling and excepting to this line of questioning, as covered by Exception No. 5.

The WITNESS.—(Continuing.) I think Mr. Davey has covered the matter fully as it occurred; that is my memory of it, so you can refer to his conversation as my answer. I may and I may not have ever had any further conversation concerning the execution of those agreements, either as a representative of the Union Land and Cattle Company, or as a stockholder, or in some other capacity, with some representative of either of the banks named; more than likely I did. My recollection is that I probably did; I would not say positively, but I think that I talked to Mr. Hooper regarding it; I would not say positively; discussing the matter in a general way, that is my memory. I don't think that I had ever talked it over with Mr. Spreckels about the execution of that agreement. I can't say definitely as to whether Mr. Hooper stated to me that, as representative of the Union Land and Cattle Company, if I did not sign them, they would take over the property, or whether he said they would foreclose the trust deed; I wouldn't want to say positively, but he imparted to the people present words to that effect; I can't say the exact words,

(Testimony of W. H. Moffat.)

but his meaning was that if the Union Land and Cattle Company would not agree to the methods of procedure which were about to take place in the directors' meeting, that would be what would probably occur. Following that statement, or threat, if you please, there was a meeting and resolutions were passed in accordance [85] with which the agreements were signed. [86]

TESTIMONY OF A. CRAWFORD GREENE, FOR APPLICANTS (RECALLED).

A. CRAWFORD GREENE, recalled as a witness by applicants, testified as follows:

The WITNESS (Under Direct Examination by Mr. DORSEY).—My recollection is that the second agreement of January 15, 1923, was never presented to the Court; that we went into chambers and came out of chambers, and it was finally withdrawn. I was present when it was discussed in the presence of the Court in Judge Farrington's chambers; the date was somewhere around the first of May, 1923. As to the question as to whether at that time I stated to anyone that failing to sign that agreement, the creditors would not get two bits on the dollar—if you mean at the time that conference was held before Judge Farrington in his chambers, the answer is no; but we went out of Judge Farrington's chambers and went outside of the courtroom here and my recollection is that Mr. Moffat and Mr. E. E. Brown and I should say, possibly, Mr. Smith—it did not make any particular

(Testimony of A. Crawford Greene.)

impression on me; I happen to remember the occasion because I was considerably disappointed—we were together, and I said I considered it a great misfortune from the point of view of the creditors that the plan had to fail, and, in my judgment, as a guess, the creditors would not get more than between twenty-five and fifty cents on the dollar. I have known Mr. E. E. Brown for a number of years. I saw him two or three weeks ago. I saw him after the receiver had filed a petition here requesting instructions as to how to proceed in the future in the matter of liquidating the affairs of the Union Land and Cattle Company. That petition was filed on May 10th and it was after that that [87] I saw him. Mr. E. E. Brown represents the eastern banks in a very informal sort of way. There are seven banks and Mr. Brown is the conduit of information that passed back and forth; and also as a lawyer, advises them from time to time. My judgment is that he with others has been the representative of those eastern banks since the appointment of the receiver. I don't want to give the impression that he alone is the representative there; he is one of the people that have been in touch with the situation; he has come out here with power to represent those banks from time to time; he came out here one time with several hundred thousand dollars—at the time that the second agreement of January 15, 1923, was to have been signed. This several hundred thousand dollars, to which you have referred, consisted of about $60,000 to pay ten

(Testimony of A. Crawford Greene.)

per cent to local creditors; and the balance was to supply the Union Land and Cattle Company with working capital, and to pay expenses that were involved in the property's reorganization. This money was, as I understand it, on deposit subject to his order for the purposes that I outlined. When Mr. Brown came out here within a short period, the last time I saw him, he came with Mr. T. W. Bowers, Vice-President of the National Bank of Commerce; I came together with them from the East. As to whether Mr. Brown told me, either in the presence or without the presence of Mr. Bowers, that if the receiver were discharged and another receiver named by him should be appointed, that nothing would be urged toward the liquidation of this company for another year, I replied as follows:

Mr. Brown and Mr. Smith were in my office some two or three weeks ago, and Mr. Smith had stated in general terms an idea that he had with reference to liquidation of the property; Mr. Brown [88] had told him with entire frankness, and I think Mr. Smith will agree with candor, that from the viewpoint of the eastern creditors it was most desirable that he should resign, and that Mr. Petrie should be appointed in his place; that a program had been approved by the eastern creditors, which of course was suggestive only to the Court, that the Court would proceed within the limits prescribed by the Circuit Court of Appeals; and from the point of view of the eastern creditors it was essen-

(Testimony of A. Crawford Greene.)

tial that a date be fixed on which the property be liquidated; that he was willing, however, if Mr. Petrie could be given full rein to attend to the sale and the liquidation of the property, not to press the petition at this time, but to see what results could be brought about by an effort of two or three months toward liquidation. There was other conversation, but substantially I think that is the basis of the discussion. Mr. Brown did not say that if Mr. Smith would withdraw and Mr. Petrie, or at least someone else, would take his place as receiver, no steps would be taken by the eastern creditors during the remainder of this year. Nor did he say that under such circumstances, no steps would be taken any way during the remainder of this year, nor during the year 1925; he made no statement approaching that or resembling it; and he would not have made such a statement without consulting my firm. Mr. Brown has been in the habit of consulting me concerning all things done here from about July of 1922. My firm succeeded Mr. Cushing as attorney for the First Federal Trust Company and the First National Bank after Mr. Cushing's withdrawal. It is of record that Judge Olney has stated that he advised the First Federal Trust Company to file an application, the first application that was filed by the trustee. In connection with the application filed by [89] the banks, that was done in conjunction with Mr. Brown and Mr. Henley and others. It is my recollection that it is the fact that I approved of the advice that Judge Olney has stated was given by

(Testimony of A. Crawford Greene.)

him. I had nothing to do with the First Federal Advisory end, but he did. Judge Olney and his firm is responsible for the beginning of these proceedings in May, 1923. They advised it and the proceedings were initiated; I suppose a principal is always eventually responsible for what he does. I suppose that the First Federal Trust Company is responsible for what it does and that, therefore, it shoulders the responsibility for the initiation of the proceedings beginning with the filing of the petition for leave to sue the receiver in May, 1923. When the petition was filed to sue the receiver in 1923, my firm represented the First Federal Trust Company. We didn't represent it in this proceeding in any sense; we represent it in other business. Mr. Jones is here representing the First Federal Trust Company. As far as the First Federal Trust is concerned, we don't represent it in any way in this proceeding. As far as First National Bank is concerned, I stated the other day it did not desire to be represented in this proceeding by anybody, and it is not represented in this present proceeding by us. We have at all times since 1923 represented the so-called eastern banks with a total claim of $1,800,000. At the time that you refer to, we also represented the First Federal Trust Company, whose claim was some, I suppose about $840,000, if my memory is correct, and the First National Bank, whose claim was $400,000. We had also been consulted by Hathaway, Smith & Foulds, who were the purchasers of the commercial paper;

(Testimony of A. Crawford Greene.)

that paper had passed to different owners, and they were not in a position to secure [90] their representation from each of the owners, but they wished us to represent them with the banks in their policy of liquidation and settlement as far as possible. That was in the beginning, in May of 1923. There has been no change in the status; but as I stated to his Honor before this, I have no definite legal authority, nor has my firm, to act for the individual holders of that paper at the present moment. Hathaway, Smith & Foulds, we have represented in numerous matters, but they have no standing here as such; we do not represent them here. [91]

The foregoing constitutes a full and complete statement of all of the evidence, documentary and oral, offered or presented on the trial and hearing of the application of J. W. Dorsey and W. E. Cashman for compensation as attorneys for Union Land and Cattle Company and special counsel for the receiver, and for repayment of costs and expenses alleged to have been advanced and paid on behalf of said Union Land and Cattle Company and its creditors, notice of which application was filed with the above-entitled court in the above-entitled cause on the 18th day of June, 1924, and also of all proceedings had thereon and the foregoing is herewith presented by the said interveners as and for the statement to be used by the said interveners upon their appeal from the order of said Court in said cause, made and filed on August 4, 1924, upon said application.

Dated ——, 1924.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners. [92]

STIPULATION RE STATEMENT OF EVIDENCE.

IT IS HEREBY STIPULATED by and between the respective parties hereto as follows:

1. That the foregoing statement is a true, complete and properly prepared statement of evidence adduced upon the trial and hearing of the application of Messrs. J. W. Dorsey and W. E. Cashman for compensation as attorneys for Union Land and Cattle Company and special counsel for the Receiver and for repayment of costs and expenses alleged to have been advanced and paid on behalf of said Union Land and Cattle Company and its creditors, and of all of the said evidence, both documentary and oral, offered or presented upon said trial and hearing, and also of all proceedings had thereon;

2. That the foregoing statement may be approved by the above-entitled court and may be settled as and for the statement to be used by the said interveners upon their appeal from the order of said court in said cause made and filed on August 4, 1924, upon said application;

3. That the foregoing statement may be used as a statement of the evidence of said interveners upon the appeal by said interveners from the said order of August 4, 1924, [93] granting in part the application of said J. W. Dorsey and W. E. Cashman.

Dated: ——, 1924.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interverers.

_____,
_____,
In Propria Persona.

_____,
_____,
_____,
Attorneys for W. T. Smith, as Receiver for said Union Land and Cattle Company.

_____,
_____,
Attorneys for Defendant Union Land and Cattle Company. [94]

ORDER APPROVING STATEMENT OF EVIDENCE.

Upon the foregoing stipulation, and good cause appearing therefor, the foregoing statement is

hereby found to be a true, complete and properly prepared statement of the evidence upon the trial and hearing of the above-mentioned application of J. W. Dorsey and W. E. Cashman, notice of which was filed on June 18, 1924, in the above-entitled cause, and of all proceedings had thereon, and as such it is approved.

It is further ordered that said statement may be used by said interveners herein upon their appeal from said order of August 4, 1924, made and filed by the above-entitled court upon said last mentioned application of said J. W. Dorsey and W. E. Cashman.

Dated: Nov. 26th, 1924.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: No. B-11—In Equity. District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant, Old Colony Trust Co., a Corporation, et al., Interveners. J. W. Dorsey and W. E. Cashman, Applicants. Statement of Evidence for Use on Appeal by Interveners from Order Awarding Compensation to Messrs. Dorsey and Cashman. Filed Nov. 26, 1924. E. O. Patterson, Clerk. By O. E. Benham, Deputy. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [95]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable EDWARD S. FARRINGTON, District Judge of the United States in and for the District of Nevada:

The above-named interveners, Old Colony Trust Company, a Corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, the First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, [96] and each of them, feeling themselves aggrieved by the order and decree entered in this cause on the 4th day of August, 1924, authorizing and directing W. T. Smith, as Receiver of the above-named defendant, Union Land and Cattle Company, in the above-entitled action, to pay to J. W. Dorsey and W. E. Cashman Twenty-five Hundred Dollars ($2500) for services heretofore rendered said Receiver in the Circuit Court of Appeals, out of funds of said Union Land and Cattle Company in his hands as such receiver, do, and each of them does, jointly and severally appeal from the said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herein, and said interveners jointly and severally

pray that such appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers in said matter, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their said appeal be made.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners. [97]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

The above petition is hereby granted and the above appeal is hereby allowed upon the said petitioners and interveners giving bond conditioned as required by law in the sum of Five Hundred Dollars ($500).

Dated, October 31st, 1924.

E. S. FARRINGTON,
Judge of the District Court of the United States for the District of Nevada.

[Endorsed]: No. B–11—In Equity. In the District Court of the United States, in and for the District of Nevada. The First National Bank of

San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, a Corporation, et al., Interveners, J. W. Dorsey, et al., Applicants. Petition for Appeal and Order Allowing Same. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [98]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF

BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

ASSIGNMENT OF ERRORS.

Now come the interveners above named, Old Colony Trust Company, a corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, and as a part of their prayer for an appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the [99] above-entitled court made and entered herein on the 4th day of August, 1924, authorizing and directing W. T. Smith as Receiver of the above-named defendant, Union Land and Cattle Company, in the above-entitled action to pay to J. W. Dorsey and W. E. Cashman Twenty-five Hundred Dollars ($2500) for services theretofore rendered said receiver in the Circuit Court of Ap-

peals, out of funds of said Union Land and Cattle Company, in his hands as such receiver, tender and file this their assignment of errors, to wit:

(1) Said District Court erred in said order of August 4, 1924, in directing said W. T. Smith as such receiver to pay to J. W. Dorsey and W. E. Cashman Twenty-five Hundred Dollars ($2500) for services theretofore rendered said receiver in the Circuit Court of Appeals.

(2) Said District Court erred in its said order of August 4, 1924, because it abused its discretion in authorizing and directing said W. T. Smith as such receiver to pay to J. W. Dorsey and W. E. Cashman Twenty-five Hundred Dollars ($2500) for services theretofore rendered said receiver in the Circuit Court of Appeals.

(3) Said District Court in said order of August 4, 1924, erred in directing said W. T. Smith as such receiver to pay to J. W. Dorsey and W. E. Cashman the sum of Twenty-five Hundred Dollars ($2500), or any sum, for services theretofore rendered to said receiver in said Circuit Court of Appeals, or for any services, because said Dorsey and Cashman were during all of the times when the alleged services were rendered attorneys of record for the defendant, Union Land and Cattle Company, in said action No. B–11, and for certain other unsecured creditors of said Union Land and Cattle Company. [100]

(4) Said District Court in said order of August 4, 1924, erred in directing said W. T. Smith as such receiver to pay to said J. W. Dorsey and

W. E. Cashman said sum of Twenty-five Hundred Dollars ($2500) or any sum whatsoever, for services theretofore rendered to said receiver in said Circuit Court of Appeals because it was error and abuse of discretion for said receiver to employ and for said Court to authorize said receiver to employ said Dorsey and Cashman as his attorneys, said Dorsey and Cashman being at the time of the rendition of such alleged services the attorneys of record for the said defendant, Union Land and Cattle Company and for certain unsecured creditors of said Union Land and Cattle Company, and it being improper and erroneous for a receiver to employ, or for a court of equity to authorize a receiver to employ, the counsel or attorneys of record for one of the parties to the litigation of which the receiver is appointed.

(5) Said District Court in said order of August 4, 1924, erred in directing said W. T. Smith as such receiver to pay to said J. W. Dorsey and W. E. Cashman said sum of Twenty-five Hundred Dollars ($2500), or any sum whatsoever, for services theretofore rendered said receiver in the Circuit Court of Appeals, or for any services, because the controversy involved in the appeal to the Circuit Court of Appeals in which said alleged services were alleged to have been performed existed between the stockholders of the defendant, Union Land and Cattle Company, and certain unsecured creditors thereof, which said Union Land and Cattle Company and said creditors were represented by said J. W. Dorsey and W. E. Cashman

on the one hand, and petitioners herein on the other hand, and because it was improper and erroneous and an abuse of discretion for said District Court to appoint as attorneys for the receiver, or for said receiver to employ, the attorneys of record for one [101] of the parties, or for one set of the parties to said litigation and to said controversy, namely, said J. W. Dorsey and W. E. Cashman, the attorneys for said Union Land and Cattle Company and said creditors.

(6) Said District Court erred in said order of August 4, 1924, in directing said W. T. Smith as such receiver to pay to J. W. Dorsey and W. E. Cashman said sum of Twenty-five Hundred Dollars ($2500), or any sum whatsoever, for services theretofore rendered said receiver in the Circuit Court of Appeals, or for any services whatsoever, because there was no evidence before the District Court that any services whatever were rendered by said Dorsey and Cashman to said receiver, or to said Union Land and Cattle Company, or to its stockholders or creditors.

(7) Said District Court erred in said order of August 4, 1924, in directing said W. T. Smith as such receiver to pay to said J. W. Dorsey and W. E. Cashman *for* Twenty-five Hundred Dollars ($2500), or any sum whatsoever, for services theretofore rendered to said receiver in the Circuit Court of Appeals, or for any services whatsoever, because said Dorsey and Cashman in open court withdrew any claim for services rendered to said receiver in said Circuit Court of Appeals.

(8) Said District Court erred in said opinion of August 4, 1924, in directing said W. T. Smith as such receiver to pay to J. W. Dorsey and W. E. Cashman the sum of Twenty-five Hundred Dollars ($2500), or any sum whatsoever, for services theretofore rendered to said receiver in said Circuit Court of Appeals, or for any services whatsoever, because there was no evidence whatsoever before said District Court that said Dorsey and Cashman rendered any such services whatsoever to said [102] Union Land and Cattle Company, or to the creditors or stockholders thereof, for which they were entitled to be paid out of the assets of said Union Land and Cattle Company in the hands of said receiver.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners.

[Endorsed]: No. B-11—In Equity. In the District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant, Old Colony Trust Company, a Corporation, et al., Interveners, J. W. Dorsey and W. E. Cashman, Applicants. Assignment of Errors. Filed Oct. 31, 1924. E. O. Patterson,

Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [103]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, the First National Bank of Chicago, a National Banking Association, as principal, and Fidelity & Deposit Company of Maryland, as surety, acknowledge ourselves to be indebted to the above-named Union Land and Cattle Company, a corporation, W. T. Smith as receiver thereof, J. W. Dorsey and W. E. Cashman, the appellees in the above-entitled cause, in the sum of Five Hundred Dollars ($500), conditioned that whereas on the 4th day of August, 1924, in the District Court of the United States for the District of Nevada, in a suit pending in [104] that court wherein The First National Bank of San Francisco, a corporation, was complainant, and the above-named Union Land and Cattle Company, a corporation, was defendant, an order and decree was rendered authorizing and directing said W. T. Smith as receiver of the above-named defendant, Union Land and Cattle Company, in the above-entitled action to pay to J. W. Dorsey and W. E. Cashman Twenty-five Hundred Dollars ($2500) for services theretofore rendered said receiver in the Circuit Court of Appeals, out of funds of said Union Land and Cattle Company in the hands of such receiver and the above-named interveners, Old Colony Trust Company, The First National Bank of Boston, National Bank of Commerce in New York, The First National Bank in St. Louis, National Shawmut Bank of Boston, National City Bank and First National

Bank of Chicago, having been granted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation directed to said Union Land and Cattle Company, a corporation, and said W. T. Smith as receiver of said Union Land and Cattle Company, and said J. W. Dorsey and said W. E. Cashman, as appellees, citing and admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals to be holden in the city of San Francisco, State of California, on the 29th day of November, 1924, next.

Now, if said interveners shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above application to be void; also to remain in full force and effect.

FIRST NATIONAL BANK OF CHICAGO.

By O. CRAWFORD GREENE,
Its Attorney-in-fact.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

[Seal] By C. R. CARTER,
Its Attorney-in-fact. [105]

[Endorsed]: No. B–11—In Equity. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, a Corporation, et al., Interveners. J. W. Dorsey and W. E. Cashman, Applicants. Bond on Appeal. The within

undertaking is approved this 31st day of Oct. 1924. E. S. Farrington, Dist. Judge. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners. Balfour Building, San Francisco, California. [106]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National

Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

The petitioners and interveners herein, Old Colony Trust Company, a corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, in compliance with Equity Rule No. 75, hereby indicate the portions of the record to be incorporated in the transcript upon [107] appeal of said interveners from the order entered in the above-entitled cause on August 4, 1924, referred to in the petition for appeal herein, as follows:

(1) Notice of application for compensation of attorneys of Union Land and Cattle Company and Special Counsel for the receiver and for repayment of costs and expenses advanced and paid in behalf of said Union Land and Cattle Company and its creditors, filed by Messrs. J. W. Dorsey and W. E. Cashman on June ——, 1924.

(2) Minute order dated June 20, 1924, submitting above motion for decision.

(3) Opinion covering above filed August 4, 1924.

(4) Order covering above filed August 4, 1924.

(5) Statement of evidence.

(6) Petition for appeal and order allowing same.

(7) Assignment of errors.

(8) Bond on appeal and order approving same.

(9) Citation on appeal.

(10) This praecipe on appeal.

McCUTCHEN, OLNEY, MANNON & GREENE.

THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners. [108]

[Endorsed]: No. B–11—In Equity. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, Corporation, et al., Interveners. J. W. Dorsey and W. E. Cashman, Applicants. Praecipe for Transcript of Record. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [109]

In the District Court of the United States for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of the First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant, said case being No. B–11 on the docket of said court. [110]

I further certify that the attached transcript, consisting of 111 typewritten pages numbered from 1 to 111, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $60.50, has been paid to me by Messrs. McCutchen, Olney, Mannon & Greene, attorneys for the interveners in the above-entitled cause.

And I further certify that the original writ of error, issued in this cause, is hereto attached.

WITNESS my hand and the seal of said United States District Court, this 28th day of November, A. D. 1924.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.

[111]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National

Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners;

J. W. DORSEY and W. E. CASHMAN,

Applicants.

CITATION.

United States of America to Union Land and Cattle Company, a Corporation, and to W. T. Smith, Receiver of Said Union Land and Cattle Company, Under and by Virtue of That Certain Order Given and made by the Above-entitled Court in the above-entitled Action on July 28, 1920, and to J. W. Dorsey and W. E. Cashman, GREETING:

You and each of you are hereby notified that in that certain cause in equity in the United States District Court in and for the District of Nevada wherein The First National Bank of San Francisco, a corporation, is complainant, and Union Land and Cattle Company, a corporation, is defendant, [112] and in which W. T. Smith was by an order of said court duly given and made on July 28, 1920, appointed receiver of the properties of said Union Land and Cattle Company specified in said order, an order and decree was made and entered on August 4, 1924, authorizing and directing W. T. Smith as Receiver of the above-named defendant, Union Land and Cattle Company, in the above-entitled action to pay to J. W. Dorsey

and W. E. Cashman Twenty-five Hundred Dollars ($2500) for services theretofore rendered said Receiver in the Circuit Court of Appeals, out of funds of said Union Land and Cattle Company in his hands as such receiver, and an appeal to the United States Circuit Court of Appeals for the Ninth Circuit has been allowed to the above-named interveners in said cause, and each of them, from said last-mentioned order.

You, and each of you, are hereby cited and admonished to be and appear in said court at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the said order and decree so appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable EDWARD S. FARRINGTON, Judge of the United States District Court in and for the District of Nevada, this 31st day of October, 1924.

E. S. FARRINGTON,
United States District Judge.

[Seal] Attest: E. O. PATTERSON,
Clerk. [113]

Service of the within citation and receipt of a copy is hereby admitted this 25th day of November, 1924.

J. W. DORSEY, and
W. E. CASHMAN,
BROWN & BELFORD,
Attorneys for W. T. Smith, Receiver of Union Land & Cattle Company, Appellee.

J. W. DORSEY,
W. E. CASHMAN,
Attorneys for J. W. Dorsey & W. E. Cashman, *in pro. per.*, and for Union and Land Cattle Company, Appellees.

[Endorsed]: No. B–11—In Equity. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant; Old Colony Trust Company, a Corporation, et al., Interveners; J. W. Dorsey and W. E. Cashman, Applicants. Citation. Filed Oct. 31, 1924. E. O. Patterson, Clerk.

[Endorsed]: No. 4409. United States Circuit Court of Appeals for the Ninth Circuit. Old Colony Trust Company, a Corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking

Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, Appellants, vs. Union Land and Cattle Company, a Corporation, and W. T. Smith, Receiver of Said Union Land and Cattle Company, Under and by Virtue of That Certain Order Given and Made by the Above-entitled Court in the Above-entitled Action on July 28, 1920, and to J. W. Dorsey and W. E. Cashman, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed November 29, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLD COLONY TRUST COMPANY, a corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

vs.

UNION LAND & CATTLE COMPANY, a corporation, and W. T. SMITH, Receiver of said Union Land & Cattle Company, Under and By Virtue of that Certain Order Given and made by the Above-entitled Court in the above-entitled Action on July 28, 1920, and to J. W. DORSEY and W. E. CASHMAN,

Appellees.

BRIEF FOR APPELLANTS.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, JR.,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
JOHN F. CASSELL,

Attorneys for Appellants.

Parker Printing Company, 346 Sansome Street, San Francisco

Table of Contents

		Pages
I.	STATEMENT OF THE CASE	1-13
II.	ASSIGNMENTS OF ERROR	13-14
III.	BRIEF OF THE ARGUMENT	14-21
	(1) It is Error for a Court in a Receivership Action to Appoint as Attorney for its Receiver the Attorneys for One of the Parties to the Action, and Particularly So When a Conflict of Interest Exists Between the Parties Represented by the Said Attorneys and Other Parties to the Litigation	14-18
	(2) Messrs. Dorsey and Cashman upon the Hearing Withdrew All Claim for Services Rendered by Them to the Receiver Under the Orders of the Court, and Rested Their Claim for Compensation Upon the Wholly Untenable Ground that Their Services Redounded to the Advantage of All of the Creditors	18-21

Table of Authorities

	Pages
Adams v. Woods, 8 Cal. 306	15, 16
Adler v. Seaman, 266 Fed. 828, 843	15
Alderson on Receivers, Sec. 233, p. 292	15
Beach on Receivers, Sec. 262, p. 209	15
Blair v. St. L. H. & K. R. Co., 20 Fed. 348	15
Edwards on "Receivers in Chancery", p. 93	15
Gluck and Becker on "Receivers of Corporations", Sec. 52, 34 Cyc. 291	15
High on Receivers, (4th Ed.), par. 188, at p. 217	15
High on Receivers, (4th Ed.), Sec. 216, p. 258	15
McPherson v. United States 245 Fed. 35	15
Ryckman v. Parkins, 5 Paige Ch. 543 (3 N. Y. Chancery Reps. 822)	15
Tardy's Smith on Receivers, Vol. 2 (Second Ed.), Sec. 631, p. 1760	15
Vieth v. Ress, 82 N. W. 116 (Supt. Ct. of Neb. 1900)	15

No. 4409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLD COLONY TRUST COMPANY, a corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

vs.

UNION LAND & CATTLE COMPANY, a corporation, and W. T. SMITH, Receiver of said Union Land & Cattle Company, Under and By Virtue of that Certain Order Given and made by the Above-entitled Court in the above-entitled Action on July 28, 1920, and to J. W. DORSEY and W. E. CASHMAN,

Appellees.

BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the District of Nevada, dated August 4, 1924, awarding $2500 as attorneys' fees to Messrs. J. W.

Dorsey and W. E. Cashman for legal services alleged to have been rendered by them to W. T. Smith, the Receiver of the Union Land and Cattle Company, in an action then pending in said United States District Court entitled "First National Bank of San Francisco, a corporation, Complainant, against Union Land and Cattle Company, a corporation, Defendant", and numbered therein "In Equity—B-11".

The appellants are Old Colony Trust Company, First National Bank of Boston, National Bank of Commerce in New York, The First National Bank in St. Louis, National Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago. These seven banks are unsecured creditors of the defendant Union Land and Cattle Company in principal amounts aggregating $1,800,000, and they had previously been permitted to intervene in the action.

Said action No. B-11 was commenced on July 28, 1920, on which date W. T. Smith was appointed Receiver. On the same date, Messrs. George S. Brown and Samuel W. Belford were appointed attorneys for the Receiver. Ever since Mr. Smith's appointment, he has continued to act as Receiver of the assets of the Union Land and Cattle Company and Messrs. Brown & Belford have continued to act as his attorneys. Up to the present time Mr. Smith has received out of the receivership estate as compensation for his services the sum of $60,000 and Messrs. Brown & Belford have received as compensation for their services as his attorneys the sum of $15,500.

The services for which Messrs. Dorsey & Cashman were awarded the sum of $2500 are alleged to have been rendered in connection with three appeals, which were prosecuted (two of them by these appellants and one by the trustees under a bond mortgage executed by the Union Land and Cattle Company under date of September 1, 1916) from orders made in the receivership proceedings during the fall of 1923, in which the defendant Union Land and Cattle Company, and the Receiver were the appellees. These appeals were argued and submitted together before this court on March 28, 1924, and were decided by this court on April 7, 1924, in an opinion written by Circuit Judge Rudkin and concurred in by Judges Hunt and Morrow, reported in 297 Fed. at p. 353.

The three appeals are numbered in the records of this court, Nos. 4194, 4195 and 4196.

Appeal No. 4194 was by the First Federal Trust Company and Milton R. Clark as Trustees under deed of trust executed by the Union Land and Cattle Company on September 1, 1916, from an order of the District Court dated November 2, 1923, denying its petition for leave to intervene in the receivership proceeding and to exercise the power of sale vested in them under the terms of the said deed of trust. Upon this appeal this court affirmed the judgment of the District Court.

Appeal No. 4195 was an appeal by the present appellants and by the complainant in the receivership action, First National Bank of San Francisco, from an

order of the District Court denying the petition of the appellants for an order permitting the present appellants to intervene in the receivership action and denying the petition of the present appellants and of the complainant for an order directing the liquidation and sale of the assets of the Union Land and Cattle Company. Upon this appeal this court modified the order of the District Court; directed the District Court to permit the seven banks to intervene in the receivership action; and, finally, directed the District Court to proceed to liquidate in the manner specified in this court's opinion. Costs were also awarded to the appellants.

Appeal No. 4196 was an appeal by the present appellants and by the complainant and was from an order of the District Court granting the petition of the Receiver for leave to invest $110,000 in livestock and if necessary to borrow money for that purpose and to issue Receiver's certificates therefor. Upon this appeal this court reversed the order of the District Court; directed the Receiver not to make further capital investments; and awarded appellants their costs.

In connection with these appeals this court further disapproved, and found to be without justification in the evidence before the District Court, certain findings contained in the opinion of the District Judge imputing fraud and conspiracy to Mr. Rudolph Spreckels and Messrs. Cushing & Cushing.

It thus appears that the services alleged to have been performed by Messrs. Dorsey and Cashman for the

Receiver and for which compensation was awarded, were in resisting two appeals successfully prosecuted by these appellants, and in seeking to uphold unwarranted aspersions on the character of the two officials of the First Federal Trust Company, which this court branded as without support in the records before the District Court.

As a result of the decision of this court in Appeals Nos. 4194, 4195 and 4196, rendered on April 7, 1924, as aforesaid, Mr. W. T. Smith, the Receiver of the Union Land and Cattle Company, filed in the District Court an application for instructions as to how he should proceed in the liquidation of the assets of the Union Land and Cattle Company in conformity with the aforesaid opinion of this court. This last mentioned petition was filed on May 23, 1924.

On May 26, 1924, the Receiver also filed a petition for an order ratifying and authorizing the payment by him of approximately $10,000 in connection with the purchase of certain land from one R. M. Lesher, said last-mentioned order being the subject of Appeal No. 4410, which is submitted herewith.

On June 18, 1924, Messrs. Dorsey and Cashman filed in the receivership proceedings a petition for an order authorizing the Receiver of the Union Land and Cattle Company

> "to repay to the undersigned the moneys by them advanced, laid out and expended for transportation, hotel charges and other expenses by them incurred in trips to and from said Carson City, and while there, and in and about and for the benefit of said

Company, its creditors and all interested in the matter of said receivership, from May, 1923, to May, 1924, inclusive. And also for reasonable compensation for professional services as attorneys for said Cattle Company, and as special counsel for said Receiver and in the interest of said Cattle Company and of its creditors and others concerned in the properties in the hands of said Receiver; and all in protecting the properties and estate of said Cattle Company in the hands of said Receiver from spoliation, waste, sacrifice and destruction.

The moneys expended by the undersigned for the purposes aforesaid aggregate the sum of Six Hundred Twenty and 57/100 Dollars ($620.57).

The fee which will be asked through the motion above mentioned for the professional services rendered by the undersigned during the period above limited, will be the amount to be fixed by the Court as a reasonable compensation for the professional services referred to in and about the petitions, orders and appeals therefrom, heard and made in the above-entitled court, and for services performed in the several appeals taken from orders entered by the above-entitled court in said above enumerated matters."

(Tr. pp. 4-5.)

The three petitions, namely, the petition of the Receiver for instructions; the petition of the Receiver respecting the Lesher transaction; and the petition of Messrs. Dorsey and Cashman for compensation, came on for hearing in the District Court on June 18, 1924, and were heard together, the hearings extending over a period of three days. The matter was then submitted, and on August 4, 1924, all three were decided by the District Court.

In the opinion filed by the District Judge on August 4, 1924, Judge Farrington said respecting the application of Messrs. Dorsey and Cashman for compensation:

> "Petitions for orders directing the receiver to surrender the mortgaged property to the trustees, and to sell the remaining property forthwith, were denied, and appeals were speedily taken. The issues were of such vital importance that it was deemed expedient and necessary to employ additional counsel to assist Messrs. Brown & Belford in the presentation of the receiver's cases in the Circuit Court of Appeals. Accordingly, the receiver was directed to retain Messrs. Dorsey and Cashman. They were familiar with all the evidence and the issues involved; they were also heartily in accord, not only with the theory that the Trust Company had waived the alleged default, notwithstanding the provisions against waiver in the trust deed, but that the receivership could not be a default within the meaning of the trust deed, if, when the receiver was appointed, the Court was not informed that under the trust deed such an order of appointment would constitute a default entitling the trustees to immediate possession of all the mortgaged property, with the right to sell it on such terms as they might fix.
>
> The services performed by them were not only exceedingly valuable, but they are deserving of much larger compensation than the $2,500 which I here allow. To argue that their assistance was unnecessary and the employment unwise, might perhaps be regarded as depreciating the ability and legal skill of the array of eminent and confident counsel opposed to the four attorneys representing the receiver.
>
> Trustees etc. v. Greenough, 105 U. S. 527;
> Burden Central Sugar-Refining Co. v. Ferris Sugar Mfg. Co., 87 Fed. 810.

> Said fee of $2,500, and the costs necessarily incurred by Messrs. Dorsey and Cashman in printing briefs, etc., will be paid by the receiver."
>
> (Tr. pp. 14-15.)

In the order made on August 4, 1924, Judge Farrington disposed of the application for compensation by Messrs. Dorsey and Cashman as follows:

> "He (the Receiver) is also directed to pay to J. W. Dorsey and W. E. Cashman $2500, for services heretofore rendered the receiver in the Circuit Court of Appeals."
>
> (Tr. p. 28.)

Acting upon the basis of the foregoing order the Receiver has since paid to Messrs. Dorsey and Cashman the sum of $2,500 out of the funds of the Union Land and Cattle Company in his hands.

The issues presented by this appeal are clean-cut and admit of no elaboration.

Messrs. Dorsey and Cashman, as shown by the record before the court, were the attorneys of record in action No. B-11, the receivership action in the District Court, *for the Union Land and Cattle Company, the defendant in that action.* They also represented a group of local Nevada creditors of the Union Land and Cattle Company, having claims amounting to approximately $500,000, and who were from the start aligned with the defendant, the Union Land and Cattle Company, and its stockholders, against the complainant in the action and the seven intervening banks now appearing as appellants on this appeal, in an exceedingly bitter contro-

versy which had existed between these two sets of conflicting interests. In every proceeding which took place from June, 1923 up to the time of the appeals, Messrs. Dorsey and Cashman appeared advocating the policy desired by the defendant, the Union Land and Cattle Company, its stockholders and the so-called Nevada creditors, and opposed the policy advocated by the complainant and the seven intervening banks.

That Messrs. Dorsey and Cashman were in fact the attorneys of record for the Union Land and Cattle Company and the Nevada creditors is not denied, inasmuch as they appeared of record in all the proceedings. Mr. W. T. Smith, the Receiver, moreover, testified that he employed them to act as attorneys for the defendant corporaion about May of 1923. Mr. Smith is a large stockholder of the Union Land and Cattle Company and stated that he felt that the corporation needed representation and for that reason he employed Messrs. Dorsey and Cashman and told them that if necessary he would pay their compensation out of his own funds (Tr. p. 82).

That a bitter conflict of interest existed between the Union Land and Cattle Company and the Nevada creditors, represented by Messrs. Dorsey and Cashman, on the one hand, and the complainant and the seven intervening banks on the other hand, is well known to this court. The defendant, Union Land and Cattle Company, and the Nevada creditors desired that the Receiver should continue to operate the properties in the hope of an improvement in the livestock market. The com-

plainant and the seven intervening banks desired that the receivership should terminate forthwith, that the properties be sold, and the assets of the company distributed so far as they would go in the liquidation of the unpaid indebtedness of the company. That the conflict of interest was deep-rooted became additionally manifest to this court from observing the aspersions cast upon the representatives of the complainant and the seven eastern banks in the opinion of the District Court, which were found to be without foundation by this court.

With these two elements established, namely, the fact that Messrs. Dorsey and Cashman were the attorneys of record for one set of parties to the liquidation; and, secondly, that as between such parties on the one hand and the complainant and the intervening banks on the other hand there existed a conflict of interest, the case is brought squarely within the rule that an attorney for one of the parties to an action in which a Receiver is appointed may not be appointed to represent the Receiver and may not be paid compensation out of the receivership estate for such services if rendered.

In violation of this rule the District Judge made three orders:

On March 17, 1924, in action No. B-11, Judge Farrington entered the following order:

> "The receiver herein is authorized to employ such additional legal assistance as he may think necessary, connected with the three appeal cases, to wit, No. 4194, No. 4195 and No. 4196, pending in the United States Circuit Court of Appeals for the

Ninth Circuit, in which he as receiver is now interested as the appellee."

(Creditor's Exhibit A; Tr. p. 61.)

On March 26, 1924 (only two days before the argument of appeals Nos. 4194, 4195 and 4196 before this court on March 28, 1924) Judge Farrington entered the following order:

"J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals of the United States for the Ninth Circuit, with full authority to represent the receiver therein, to wit:

First Federal Trust Company (a Corporation), and Milton R. Clark, as trustee under and by virtue of that certain deed of trust or indenture dated, September 1, 1916, executed by Union Land and Cattle Company (a corporation), to First Federal Trust Company (a corporation), and Milton R. Clark, trustees, Appellants, v. The First National Bank of San Francisco (a corporation), and Union Land and Cattle Company (a corporation), and W. T. Smith, receiver of said Union Land and Cattle Company (a corporation), under and by virtue of that certain order given and made on July 28, 1920, Appellees, No. 4194.

The First National Bank of San Francisco, a corporation, Appellant, v. Union Land and Cattle Company, a corporation, and W. T. Smith, Receiver of said Union Land and Cattle Company, under and by virtue of that certain order given and made on July 28, 1920, Appellees, and Old Colony Trust Company, a corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a national banking association, The First National Bank in St. Louis, a national banking association, National Shawmut Bank of Boston, a

national banking association, and First National Bank of Chicago, a national banking association, Appellants, v. Union Land and Cattle Company, a corporation, and W. T. Smith, Receiver of said Union Land and Cattle Company, under and by virtue of that certain order given and made on July 28, 1920, Appellees, No. 4195.

The First National Bank of San Francisco, a corporation, Old Colony Trust Company, a corporation, the First National Bank of Boston, a national banking association, National Bank of Commerce in New York, a national banking association, The First National Bank in St. Louis, a national banking association, National Shawmut Bank of Boston, a national banking association, National City Bank, a national banking association, and First National Bank of Chicago, a national banking association Appellants, v. W. T. Smith, Receiver of the Union Land and Cattle Company, a corporation, under and by virtue of that certain order given and made on July 28, 1920, Appellee. No. 4196."

(Creditor's Exhibit B—Tr. pp. 62-64.)

Even Messrs. Brown & Belford, the regular counsel for the Receiver, did not know of the making of this order, or that it was in contemplation, until after it had been made and until Mr. Belford had in large measure completed the preparation of briefs in behalf of the Receiver (Tr. p. 69).

Messrs. Brown & Belford filed briefs in behalf of the Receiver and argued the cases orally in behalf of the Receiver. Pursuant to the order, Messrs. Dorsey and Cashman filed briefs in behalf *of the Union Land and Cattle Company and of the Receiver* and appeared before this court and argued the matters orally in behalf

of the Union Land and Cattle Company and of the Receiver.

On August 4, 1924, as above stated, the District Court made the order complained of, awarding Messrs. Dorsey & Cashman the sum of $2500, as compensation for their services in connection with the appeals.

We submit that the order should be reversed for two reasons:

First, because it was error and abuse of discretion upon the part of the District Court to employ the attorneys of record for the defendant and certain creditors to represent the Receiver in a controversy between said defendant and said creditors on the one hand and the complainant and the seven intervening banks on the other hand;

Secondly, because during the course of the trial Messrs. Dorsey and Cashman in open court disclaimed any right to compensation for any services which they might be deemed to have rendered to the Receiver, and based their contention upon a wholly untenable claim that they were entitled to compensation on the theory that their services had redounded to the benefit of all of the creditors of the Union Land and Cattle Company.

II. ASSIGNMENTS OF ERROR.

(1) Appellants assign as error and as abuse of discretion by the District Court the awarding of $2500, or any sum, to Messrs. Dorsey and Cashman for legal ser-

vices rendered by them to the Receiver for the reason that said Dorsey and Cashman were attorneys of record in action No. B-11 for the defendant Union Land and Cattle Company and the so-called Nevada creditors, because a receivership court may not appoint the attorney for one of the parties to the action to represent its Receiver in a controversy in which a conflict of interest exists between said parties and other parties to the litigation (Assignments of Error Nos. 1, 2, 3, 4, 5 and 6, tr. pp. 109-111).

(2) Appellants assign as error the allowance to said Dorsey and Cashman of said sum of $2500, or any sum whatever, for services rendered to the Receiver in the Circuit Court of Appeals because said Dorsey and Cashman in open court disclaimed any right to compensation for services rendered by them to said Receiver in said Circuit Court of Appeals (Assignments of Error No. 7, tr. p. 112).

III. BRIEF OF THE ARGUMENT.

(1) IT IS ERROR FOR A COURT IN A RECEIVERSHIP ACTION TO APPOINT AS ATTORNEYS FOR ITS RECEIVER THE ATTORNEYS FOR ONE OF THE PARTIES TO THE ACTION, AND PARTICULARLY SO WHEN A CONFLICT OF INTEREST EXISTS BETWEEN THE PARTIES REPRESENTED BY THE SAID ATTORNEYS AND OTHER PARTIES TO THE LITIGATION.

There is no dissent as to this rule in the authorities.

Tardy's Smith on Receivers, Vol. 2 (Second Ed.), Sec. 631, p. 1760;

High on Receivers, (4th Ed.), Sec. 216, p. 258;
Alderson on Receivers, Sec. 233, p. 292;
Beach on Receivers, Sec. 262, p. 209;
Gluck and Becker on "Receivers of Corporations", Sec. 52, 34 Cyc. 291;
Edwards on "Receivers in Chancery", p. 93;
McPherson v. United States, 245 Fed. 35;
Adler v. Seaman, 266 Fed. 828, *843*;
Blair v. St. L., H. & K. R. Co., 20 Fed. 348;
Vieth v. Ress, 82 N. W. 116 (Sup. Ct. of Neb. 1900);
Ryckman v. Parkins, 5 Paige Ch. 543 (3 N. Y. Chancery Reps. 822);
Adams v. Woods, 8 Cal. 306.

Under this rule it follows as a necessary corollary that an order directing the Receiver to make a payment to attorneys for services alleged to have been rendered by such attorneys to the Receiver following an appointment not valid because of the fact that such attorneys were representative of one of the parties to the action, will be reversed.

High on Receivers, (4th Ed.), par. 188, at p. 217:

> "Indeed, it has been held reversible error to make an allowance of counsel fees to a receiver's attorney who also represented the plaintiff in the action."

In

Vieth v. Ress, supra,

the Supreme Court of Nebraska in 1900 reversed such an order, saying:

"One of the attorneys for the plaintiff was appointed as attorney for the receiver, and awarded $100 for his services. This allowance was resisted, and is complained of here. We think the court erred in appointing Mr. Pettis to act for the receiver, over the protest of creditors. The interests of the debtor and creditor are conflicting, and the same attorney cannot with propriety act for the receiver, who represents both. The statute provides that 'no person shall be appointed receiver who is party, solicitor, counsel, or in any manner interested in the suit.' Section 271, Code Civ. Proc. The policy that requires the appointment of an impartial receiver would seem to dictate that his legal adviser be impartial, too. We think the law upon this subject is correctly stated by Beach in his work on the Law of Receivers (Alderson's Ed., 1897). At page 274 the learned author says: 'The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver operate, also, to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his client, will, in most cases if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties such as cannot be properly performed by one person.'" * * *

"For the error committed by the court in allowing Mr. Pettis $100 for services rendered by him as attorney for the receiver, the decree will be reversed and the cause remanded, with direction to the district court to render a judgment conforming to the views expressed in this opinion. Reversed and remanded."

In

Adams v. Woods, supra,

the rule was applied by the Supreme Court of California

to facts quite similar to those involved in the instant case. In an action brought by Adams v. Woods & Haskell for a dissolution of partnership, the trial court in allowing compensation for legal services to one Stanley, who had been appointed by it attorney for its receiver, denied a claim made by Stanley for compensation for Messrs. Shafter & Park, who, he asserted, had acted as associate counsel with him. Stanley appealed and the judgment of the District Court was affirmed, upon the ground that Shafter & Park could not be allowed compensation for services rendered to the Receiver for the reason that they were the attorneys of record for one of the individual parties to the litigation.

In applying this rule, Mr. Justice Burnett, speaking for the Supreme Court of California, said:

> "The salutary character of the rule which will not permit a receiver to employ as *his* counsel those engaged for any other party to the proceedings, and the necessity for sustaining and enforcing it, are forcibly illustrated, and confirmed by the facts and circumstances of this case. The counsel seem to have been fully aware of the rule, otherwise we cannot account for the circumstance that Shafter & Park were not associate counsel on the record, but were such in point of fact."

* * * * * * * *

> "The principle settled in these authorities is entirely applicable to the facts of this case. Shafter & Park being the counsel of Adams, had no right to subject themselves to the counsel of the receiver; and any services they may have performed, must be held to have been performed for their own client, and they must look to him alone for compen-

sation. It would be as safe to permit a receiver to act as his own counsel, and to allow him compensation therefor, as to permit the attorney of the plaintiff to act for the receiver, and then claim pay out of the fund in his hands. The practice, if tolerated, would lead inevitably to the most melancholy abuses. Attorneys are officers of the court, and it is its highest duty to see that its own officers conduct themselves properly; and that this end may be obtained, the court should inflexibly discountenance every practice that may tend to bring reproach upon the administration of justice."

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(2) MESSRS. DORSEY AND CASHMAN UPON THE HEARING WITHDREW ALL CLAIM FOR SERVICES RENDERED BY THEM TO THE RECEIVER UNDER THE ORDERS OF THE COURT, AND RESTED THEIR CLAIM FOR COMPENSATION UPON THE WHOLLY UNTENABLE GROUND THAT THEIR SERVICES REDOUNDED TO THE ADVANTAGE OF ALL OF THE CREDITORS.

Upon the hearing Mr. Dorsey disclaimed any right to compensation under the orders of March 17, 1924, and March 26, 1924, for services rendered to the Receiver in connection with the appeals in the Circuit Court of Appeals.

We quote in this connection from Mr. Dorsey's testimony:

"The WITNESS. In all the proceedings to which Mr. Cashman has referred, including those referred to in connection with my employment by the receiver, I was acting exclusively for the Union Land and Cattle Company, from the beginning of the proceedings initiated by the filing of the petition to sue the receiver until, and only until we went, just

before we went into the hearing of the case on appeal. I represented, I think, all the creditors in all things that I have done since I was first employed by the Union Land and Cattle Company, not only the particular creditors mentioned by us, and our own creditors, but your clients. I thought I knew I represented the First National Bank of Chicago, and I think I know I did. I think the attempt here was to destroy this institution, to sell this institution and I thought, and still think that those proceedings would have resulted, if successful on your part, in destroying the value of the property, impoverish my clients, and hurt, I mean lessen the moneys that your clients would receive. I thought the course that I was taking was for the advantage of the creditors, and all of the creditors of the Union Land and Cattle Company. I was representing the company which owed these obligations to the creditors, and I acted in behalf of all the creditors, if that is what you mean. I was really employed by and acted for the company, and in the interest of the creditors, and that is the only interest I have. Let me make a preliminary statement. Perhaps I was a bit hasty this morning in saying in the weakness of the moment that at this hearing I was representing the receiver. I want to say what I have done in behalf of the receiver, or in that interest, was done because it was to the advantage of the Union Land and Cattle Company to have it done; I was called to render that assistance, and I want nothing for it, and my bill does not include that, I want no pay for that. I want no pay for anything done in the interest of the receiver as such; so that this claim does not include any services rendered to the receiver, either in this court or the appellate court, or in this proceeding. Therefore, my claim is made for work done wholly in the interest of the Union Land and Cattle Company, incidentally and of course primarily in the interest of its creditors."

(Tr. pp. 38-39.)

We quote again from Mr. Dorsey's testimony appearing at page 41 of the record:

> "Mr. GREENE. Colonel Dorsey, in your petition you ask for compensation on account of services rendered to the receiver, unless I am very much mistaken.
>
> Mr. DORSEY. Well, maybe that is so, I don't remember. If it is so, I withdraw it. Professional services rendered, and as special counsel for the receiver; I move that be stricken out; I withdraw that statement. I think I put that in myself."

Upon the basis of these statements by Mr. Dorsey, the claim of Messrs. Dorsey and Cashman for compensation was reduced to the proposition that the object of the complainant and the seven intervening eastern banks (the appellants herein) was throughout all of the litigation leading up to Appeals Nos. 4194, 4195 and 4196, seeking to destroy the value of the assets of the Union Land and Cattle Company; that Messrs. Dorsey and Cashman were in effect entitled to compensation from the complainant and the seven eastern banks for opposing them and for endeavoring to prevent them from accomplishing the object which they were seeking to obtain themselves.

The answers to this proposition are too apparent to require elaboration.

In the first place the complainant and the intervening banks (the appellants) were successful in two of the three appeals.

In the second place this court, in its opinion in connection with Appeals Nos. 4194, 4195 and 4196, found that there was no basis whatever for the charges of

wrongdoing made in Judge Farrington's opinion of January 17, 1924.

In the third place, it is obvious that whatever services were performed by Messrs. Dorsey and Cashman at the instance of the Union Land and Cattle Company and its stockholders, and at the instance of the Nevada creditors, were rendered in furtherance of the policy which those parties to the litigation favored, namely, that of continued operation, and in opposition to the policy which the complainant and the seven intervening banks desired, namely, that of liquidation, etc.

Finally, the order made by Judge Farrington on August 4, 1924, does not purport to award Messrs. Dorsey and Cashman compensation for services rendered to the Union Land and Cattle Company and its stockholders and to the Nevada creditors, and incidentally resulting favorably to the other creditors, but was specifically for services found by Judge Farrington to have been rendered to the Receiver pursuant to Judge Farrington's orders of March 17, 1924, and March 26, 1924.

It is respectfully submitted that the order appealed from should be reversed.

Dated, January 26, 1925.

McCutchen, Olney, Mannon & Greene,
Thatcher & Woodburn,
Warren Olney, Jr.,
J. M. Mannon, Jr.,
A. Crawford Greene,
George B. Thatcher,
John F. Cassell,

Attorneys for Appellants.

No. 4409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLD COLONY TRUST COMPANY (a corporation), THE FIRST NATIONAL BANK OF BOSTON (a National Banking Association), NATIONAL BANK OF COMMERCE IN NEW YORK (a National Banking Association), THE FIRST NATIONAL BANK IN ST. LOUIS (a National Banking Association), NATIONAL SHAWMUT BANK OF BOSTON (a National Banking Association), NATIONAL CITY BANK (a National Banking Association), and FIRST NATIONAL BANK OF CHICAGO (a National Banking Association),

Appellants,

vs.

UNION LAND & CATTLE COMPANY (a corporation), and W. T. SMITH, receiver of said Union Land & Cattle Company, under and by virtue of that certain order given and made by the above-entitled court in the above-entitled action on July 28, 1920, and to J. W. DORSEY and W. E. CASHMAN,

Appellees.

BRIEF FOR APPELLEES.

J. W. DORSEY,
W. E. CASHMAN,
Royal Insurance Building, San Francisco,
In Propriis Personis and as Attorneys for Appellees.

S. W. BELFORD,
GEO. S. BROWN,
Nixon Building, Reno, Nevada,
Attorneys for All Appellees.

Subject Index

		Pages
I.	Statement of facts, and of events previous to and surrounding the employment of J. W. Dorsey and W. E. Cashman by the defendant company and by its receiver	1 - 9
	Petition for reimbursement and compensation	2 - 3
	Properties in hands of receiver	3 - 4
	Receiver authorized to employ attorneys by the order of appointment	4
	Original purpose of plaintiffs and appellants was to operate the Cattle Company as a going concern	4 - 5
	Event of default in trust deed	6
	Filing of petition to sue receiver and petitions in intervention	7 - 8
II.	Employment of J. W. Dorsey and W. E. Cashman by Union Land & Cattle Company and as attorneys for the receiver	9 - 29
	By Union Land & Cattle Company	9
	Testimony of W. T. Smith in re employment by the Cattle Company	9 - 11
	When, why and how appellants intervened	12 - 14
	Threatening letter R. Spreekels to receiver	14 - 15
	Threat of counsel for appellants	15 - 16
	Employment by receiver	16 - 18
	Testimony of receiver in re employment by receiver	16 - 17
	Order authorizing receiver to employ additional counsel	18
	Order appointing additional counsel	19
	As to the character and value of the services rendered by J. W. Dorsey and W. E. Cashman under their employment by the Cattle Company and by the receiver	19 - 29
	Testimony of W. E. Cashman	19 - 21
	Testimony of J. W. Dorsey	22 - 23
	Testimony of M. R. Jones	23 - 24
	Testimony of A. Crawford Greene	24 - 25
	Testimony of Samuel W. Belford	25 - 26

Pages
Statement of J. W. Dorsey in re services.....26 - 28
Statement of Judge Farrington as to value of services..... 29

III. The court may properly allow, and when appointed by him or by his authority should allow, counsel fees and expenses incurred in protecting and preserving or increasing the fund under its control..29 - 40
Citation of cases relied upon by appellees.....29 - 30
When and in what circumstances Messrs. Dorsey and Cashman were employed..... 30
They were familiar with the case, and in full accord with the desire of the receiver and the company to prevent foreclosure of the trust deed and to preserve the funds.....30 - 33
Quotations from and citation of cases showing that a trust fund must bear all expenses properly incurred in its administration, protection, preservation and distribution.....33 - 40

IV. Appellants' authorities on pages 14 to 18 of their brief are inapplicable to the facts presented by this appeal.....40 - 48
Argument, supported in part by the authorities upon which appellants rely, that it is only where there is a conflict of interest or duty between the receiver and the attorney employed to represent him; or where the receiver and the attorney occupy different positions in the controversy, or owe antagonistic duties with respect to the fund at stake; or where the duty of the attorney to the receiver and to the court, and to a party whom the attorney represents, are adverse, that the employment is improper.

V. Replying to the statement that Messrs. Dorsey and Cashman at the hearing withdrew all claim for services rendered to the receiver under the orders of the court (pp. 18-21 Appellants' Brief)..48 - 50
Mr. Dorsey's position was that he had rendered a service to the receivership fund; that the service could not be apportioned between the Cattle Company and the receivership; that the pay-

Pages

ment for those services should be made from the fund; the court was justified in ordering payment by the receiver under the appointment made by the court.....48 - 50

VI. The receiver was fully authorized, justified, protected and directed in making the employment and the payment.....50 - 51

Under the authority given him by the order of his appointment of July 28, 1920.

Under the authority vested in him by the order of the court of March 17, 1924.

Messrs. Dorsey and Cashman were directly appointed by the order of the court made March 26, 1924.

These additional counsel for the receiver would have been entitled to reimbursement and payment from the receivership fund, had they been mere volunteers and had thus performed the services they in fact rendered.

VII. The appeal should be dismissed.....51 - 52

Grounds for dismissal.....51 - 52

Table of Cases Cited

(Appellants' authorities italicized.)

Pages

Adams v. Woods, 8 Cal. 306 42

Adler v. Seaman, 266 Fed. 828, 843 47

Attorney General v. North American Life Ins. Co., 91 N. Y. 57, 64-5 ..... 29, 34

Burden Central Sugar Refining Co. v. Ferris Sugar Mfg. Co., 87 Fed. 810 ..... 30, 37

Central R. R. etc. v. Pettus, 113 U. S. 116; 28 L. Ed. 915 37

Civil Code, Sec. 3521 51

Code of Civil Procedure, Sec. 796 ..... 30, 40

34 *Cyc.*, 291 47

34 Cyc., Note 49, page 292 47

40 Cyc., 2808 51

First Federal Trust Co. v. First National Bank of San Francisco, 297 Fed. 356 32

2 Foster's Fed. Practice, Sec. 421 ..... 30, 39

High on Receivers (4 Ed.) Para. 188, at 217 41

In re Smith, 203 Fed. 369 46

Lamar v. Hall & Wimberly, 129 Fed. 79 ..... 30, 39

Missouri & K. I. Ry. v. Edson, 224 Fed. 79, 82 37

McPherson v. United States, 245 Fed. 35 47

Petersburg Sav. & Ins. Co. v. Dellatorre, 70 Fed. 645 ... 29, 33

Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850, 860 ..... 30, 38

Ryckman v. Parkins, 5 Paige Ch. 543; (3 N. Y. Ch. Rep. 822) 48

Shainwald, Assignee v. Lewis, 8 Fed. 878 39

Stuart v. Boulware, 133 U. S. 78; 33 L. Ed. 568 ..... 29, 33

Tardy's Smith on Receivers, Sec. 631 44

Trustees v. Greenough, 15 Otto. 527; 26 L. Ed. 1157 .. 30, 36, 39

J. C. Turner Lumber Co. v. Toomer, 275 Fed. 678 45

Vieth v. Ress, 82 N. W. 116 42

Woodruff v. New York L. E. & W. R. Co., 29 N. E. 251 .. 29, 34

Woodruff v. New York L. E. & W. R. Co., 10 N. Y. Supp. 305 ..... 29, 35

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Appellants.

vs.

UNION LAND & CATTLE COMPANY (a corporation), and W. T. SMITH, receiver of said Union Land & Cattle Company, under and by virtue of that certain order given and made by the above-entitled court in the above-entitled action on July 28, 1920, and to J. W. DORSEY and W. E. CASHMAN,

Appellees.

BRIEF FOR APPELLEES.

I.

PERISCOPIC STATEMENT OF FACTS AND OF EVENTS PREVIOUS TO AND SURROUNDING THE EMPLOYMENT OF J. W. DORSEY AND W. E. CASHMAN BY THE DEFENDANT COMPANY AND ITS RECEIVER.

This is an appeal from that part of an order of the District Court of the United States, for the District of Nevada, filed in said court on August 4, 1924, whereby the receiver was directed to pay to J. W. Dorsey and W. E. Cashman $2500 (Tr. p. 28) based upon their petition as attorneys for the Union Land & Cattle Company, filed herein on June 18, 1924, by which they sought reimbursement for moneys advanced and compensation for professional services rendered. The petition referred to is as follows:

> "Notice is hereby given, that on the 18th day of June, 1924, at the courtroom of the above-entitled court, in Carson City, Nevada, at the hour of ten (10) o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the undersigned will apply to said Court for an order authorizing the Receiver of Union Land & Cattle Company to repay to the undersigned the moneys by them advanced, laid out and expended for transportation, hotel charges and other expenses by them incurred in trips to and from said Carson City, and while there, and in and about and for the benefit of said Company, its creditors and all interested in the matter of said receivership, from May, 1923, to May, 1924, inclusive. And also for reasonable compensation for professional services as attorneys for said Cattle Company, and as special counsel for said Receiver and in the interest of said Cattle Company and of its creditors and others con-

cerned in the properties in the hands of said Receiver, and all in protecting the properties and estate of said Cattle Company in the hands of said Receiver from spoliation, waste, sacrifice and destruction.

"The moneys expended by the undersigned for the purposes aforesaid aggregate the sum of six hundred twenty and 57/100 dollars ($620.57).

"The fee which will be asked through the motion above mentioned for the professional services rendered by the undersigned during the period above limited will be the amount to be fixed by the Court as a reasonable compensation for the professional services referred to in and about the petitions, orders and appeals therefrom, heard and made in the above-entitled court, and for services performed in the several appeals taken from orders entered by the above-entitled court in said above enumerated matters.

"The said motion will be based upon this notice, the records and files in the above-entitled matters, oral and written evidence to be introduced at the hearing of said motion, and the information and knowledge possessed by said Court.

"Dated this 9th day of June, 1924.

(Sgd.) J. W. Dorsey and
(Sgd.) W. E. Cashman,
Attorneys for Defendant."

(Tr. pp. 4, 5.)

The circumstances in and following which these appellees were employed by the defendant cattle company and by the receiver are, in brief, these:

On July 28, 1920, W. T. Smith was appointed receiver for the property of the Union Land & Cattle Company at the suit of the First National Bank of San Francisco, an unsecured creditor. At the time

of the appointment the property of the cattle company consisted of about 226,000 acres of land in the states of Nevada and California; about 69 per cent of the capital stock of the Antelope Valley Land & Cattle Company; about 40,000 head of cattle; 40,000 head of sheep; 2500 head of horses; and ranch equipment. The indebtedness of the company consisted of a debt of $1,020,000, secured by deed of trust of the land of the company, and an assignment of the stock of the Antelope Valley Land & Cattle Company, and an unsecured indebtedness aggregating approximately $3,282,000. Of the latter, $400,000 was owing to the plaintiff in the receivership suit and $1,800,000 to the intervening banks.

This statement of facts is taken from the opinion of Judge Rudkin on one of the appeals herein, as reported in 297 Fed. at page 354.

The order appointing the receiver was prepared by the First National Bank of San Francisco, approved by all of the appellants here and was consented to by the defendant, Union Land & Cattle Company. It authorized the receiver to collect all of the assets of the company and to carry on its business

> " 'according to the usual course of business of like character, and to employ such employes, accountants, agents, assistants *and attorneys* as he may deem necessary and proper. 'The reasons for such an order were thus stated in the complaint:
>
> " 'That the assets of defendant if prudently operated and administered can be realized upon

over a period of time in amount sufficient to meet all of its liabilities and leave a considerable equity for the stockholders, but that the liabilities of the defendant already matured and those now about to mature cannot be met by the defendant at the present time, or as the same fall due, and defendant cannot at this time market its livestock to advantage and by reason of the present financial condition it is impossible for the defendant to get additional credit to refund its obligations due and about to become due, and the defendant is not able and will not be able to meet its obligations as they mature in the ordinary course of business.'" (Tr. pp. 9, 10.)

"This [as stated by the Honorable Judge of the lower court in its opinion upon which the order appealed from was based] was a clear and confidently expressed judgment that if the estate were prudently managed as a going business under a receivership, the liabilities could be paid and a considerable equity preserved for the stockholders." (Tr. p. 10.)

"Early in 1923 there was filed an agreement to which all or practically all creditors were parties, providing that the property in the hands of the receiver be returned to the defendant company to be managed for a number of years as a going concern by a creditors' committee consisting of attorneys and bank officials, with Warren Olney, a San Francisco lawyer, as president." (Tr. p. 10.)

"This document disclosed a belief on the part of the creditors as late as April, 1923, after three years under the receivership, that the assets of the company could not be liquidated immediately and at forced sale without loss of a large part of their value, and that the property should be liquidated over a considerable period of time, and in an orderly manner. This

cannot be construed otherwise than as a deliberately formed opinion that the business of the company should be continued during liquidation." (Tr. p. 10.)

"In May, after strenuous objection had been made to a proposed distribution of about $100,000 of defendant's funds among a number of attorneys acting for the creditors, this agreement was abandoned." (Tr. p. 11.)

"No demand for immediate liquidation had been made up to this time, but within a few weeks, and on the 18th day of May, 1923, the First Federal Trust Company filed a petition praying that it be permitted to foreclose the mortgage or trust deed executed in 1916 by the defendant company to secure the payment of $1,200,000 in bonds. Every installment of principal and interest on these bonds has, and at that time had been, paid promptly. The principal then due amounted to $840,000, or thereabouts. Foreclosure was demanded on the alleged ground that the appointment of a receiver constituted a violation of one of the express provisions of said trust deed." (Tr. p. 11.)

The particular provisions of the trust deed, upon which the banks rest their case, were:

"ARTICLE IV. Section 1. If any one or more of the following events, herein called, 'the events of default' shall happen, that is to say: * * *

"(d) An order, decree or judgment shall be made for the appointment of a receiver or receivers of the company, or of any substantial part of its property or the trust estate or any substantial part thereof." * * *

And such default should continue for the period provided by Section 1 of Article IV of the trust

deed, then the trustees should forthwith be entitled to sell at public auction to the highest and best bidder all the mortgaged and pledged properties described in the instrument.

The contention of the appellants here was that the foreclosure of the trust deed became necessary (Opinion, Tr. p. 11 et seq.)

> "because, by reason of the default created by the appointment of the receiver, the trustees named in the trust deed were powerless to release from the lien of the trust deed any mortgaged lands the receiver might sell.
>
> "This assumption, kept constantly in the foreground, seems to have been sufficient to render fruitless any attempt on the part of the receiver to sell property covered by the trust deed. Would-be purchasers in view of the uncertainties, naturally were afraid to invest. Holding the lands and disposing of the livestock, except in limited numbers, was considered as not only unwise, but highly imprudent, for several reasons: First, it would 'disrupt and disorganize the business of the Cattle Company'; second, large values would be lost if the lands were stripped of the livestock; third, under the express provisions of the trust deed, Article 3, Section 16, and Article 4, Section 1, it was provided if at any time the livestock was reduced in numbers below 25,000 cattle above one year of age, and 25,000 sheep on the lands of the company or under its control in the States of Nevada or California, that event would constitute a default entitling the trustees to take possession of the mortgaged property, and sell it on such terms as they might fix." (Opinion, Tr. pp. 11, 12.)
>
> "August 24th, 1923, the trustees named in the trust deed, on the ground that the appointment

of the receiver constituted a default, filed herein a petition asking that the mortgaged property be surrendered to them to be sold at public auction on such terms as they might fix. Within a short time thereafter eight petitions were presented by the bank creditors, approving the application of said trustees, and asserting that the trustees were 'entitled to *immediately* sell said property described in said trust deed in the exercise of the powers thereby granted.' The prayer of the bank petitioners was that all the property of the Union Land & Cattle Company, except such thereof as may be sold by said Trust Company, be sold *forthwith*. Such a program involved forced sales of everything belonging to the defendant company under conditions highly unfavorable. More than a year and a half prior to this date, January 13th, 1922, the then president of the Trust Company and of the First National Bank, wrote the receiver as follows:

" 'The committee have come to the conclusion that we might as well call the creditors' agreement off and to take immediate steps to secure control of the company's affairs or failing in that to petition the Court for an order to sell the properties.

" 'The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by actual purchase of the properties at foreclosure sale. I know there will be no change from this determination.' " (Opinion, Tr. pp. 12 and 13.)

"Every installment of interest and principal, amounting at the time to more than $400,000, had been paid out of funds on which the Trust

Company had no lien; its security seemed ample, and the alleged default consisted in the appointment of the receiver, made by the Court without any knowledge or warning that under the terms of the trust deed such an appointment could be followed by such serious consequences. Under the circumstances it was considered by the Court and the receiver that the claim of right to sell under the trust deed 'was unjust and inequitable, and that if sustained on appeal it would cause irreparable loss and injury to the unsecured creditors, the very object the receivership was invoked to prevent'; furthermore, if the mortgaged property were sold at public auction by the trustees, as contemplated by the petitioners, the receiver, having no place to keep the stock, if any remained in his hands, would inevitably be forced to sell it. As a rule, at such sales prices received are small as compared with the value of the thing sold. Forced sales of all the mortgaged real property would therefore have been a calamity to every creditor not able to buy, or participate in buying, the property." (Opinion, Tr. p. 13 and 14.)

II.

EMPLOYMENT OF J. W. DORSEY AND W. E. CASHMAN BY THE DEFENDANT, UNION LAND & CATTLE COMPANY.

(a) As to Employment in Behalf of Union Land & Cattle Company.

Testimony of W. T. Smith.

Mr. Smith testified: The circumstances under which I employed Mr. Dorsey were as follows: When the litigation first commenced here in regard to the Union—meaning the petitions in interven-

tion—I told Judge Farrington and I also told Brown & Belford— (the attorneys for the receiver) that I thought the Union Land & Cattle Company as a corporation should be represented, and said to Mr. Dorsey and Mr. Cashman, the Union has no money; it has no way to raise any money; I don't know as you will ever be paid for the work you are doing now, but if it has to be done, some of us will have to go down in our pockets and dig it up. (Tr. p. 82.)

I am a stockholder of the Union Land & Cattle Company and it was first determined by me that the Union should be represented at the initiation of the entire proceeding. It was in the spring of last year (1923). I was in San Francisco and I told Mr. Dorsey, after consultation with Judge Farrington and with Brown & Belford, that I thought the Union Land & Cattle Company as a corporation should be represented in these proceedings, and then I talked to Mr. Dorsey and Mr. Cashman about it. It was not my understanding that in the spring of 1923 Messrs. Dorsey and Cashman were representing me as receiver, not until the filing of the petitions for liquidation. (Tr. p. 83.) Then, for the first time, I went in my capacity as receiver to employ Mr. Dorsey and Mr. Cashman. I didn't say when I approached Dorsey and Cashman last spring with reference to an employment of them by the Union Land & Cattle Company, that I did so as receiver. I only told them I thought somebody should be employed to

represent the corporation. I was receiver at that time and I suggested that to them at that time, but not as receiver. (Tr. p. 84.) It was not my understanding that by my action taken in the spring of 1923, I in any way committed the receivership to the payment of any disbursements on account of any services they might render from that time on.

What prompted me to reach the conclusion that the Union should be represented by Mr. Dorsey and Mr. Cashman was because the Union Land & Cattle Company was a corporation, it was not extinct and as long as proceedings in court were going on which might affect the stockholders of the Union Land & Cattle Company, I thought somebody should represent the corporation.

I can only say that my action in the spring of 1923 was taken as an individual, trying to see my way clear to do my duty to the Union Land & Cattle Company, for which I was receiver. (Tr. p. 85.)

> "Mr. Dorsey. Q. Mr. Smith, I understood you to say a moment ago that you would regard yourself as responsible for the fee for services performed for the Union Land & Cattle Company under the employment of about May, 1923?
>
> A. I don't remember the date, Mr. Dorsey.
>
> Q. You state you regarded yourself as responsible?
>
> A. Yes.
>
> Q. Do you remember that I told you I would not hold you responsible?
>
> A. I think I do." (Tr. pp. 88, 89.)

Shortly after the interview referred to by Mr. Smith, Messrs. Dorsey and Cashman were formally employed by W. H. Moffat, as the president of the Union Land & Cattle Company, to represent it as its attorney, in the further proceedings in the case.

The eight banks, whose names appear on pages 2 and 3 of the transcript, of whom seven are the appellants here, introduced themselves into these proceedings by intervention petitions. They have been represented by different firms of attorneys. In the initial steps taken on May 18, 1923, to become active in the receivership, McCutchen, Olney, Mannon & Greene, a firm in San Francisco, comprising eighteen lawyers, appeared for The First National Bank and the First Federal Trust Company.

On August 25, 1923, Jones & Dall, Esqs. appeared as attorneys for the First Federal Trust Company in its petition for leave to intervene. Messrs. Hoyt, Norcross, Thatcher, Woodburn & Henley appeared representing the banks whose petitions for leave to intervene are enumerated on pages 1 to 3 inclusive of the transcript.

The twenty-five gentlemen named (whose services were at the command of the banks) comprise the array of counsel and answer the reference of Judge Farrington in his opinion. (Tr. p. 15.) The banks they represent are mere volunteers; they were not necessary parties to the suit. It might

have run its course and ended in a final distribution without the presence of any of them; each bank was allowed to intervene because it had its own individual and personal interest in the assets in the hands of the receiver, and solely that it might represent and protect that personal interest in the further proceedings.

They represented nobody but themselves, and owed no duty to anyone else.

The great mass of creditors did not intervene, and were content to allow their interests to be represented and protected by the receiver, and his counsel, under the control of the court. The banks did not appear to stand in the attitude of interested observers only; they came in to fight anybody who contested their right to wreck the company; to challenge the right of the court to control, and of the receiver to possess, about $3,000,000 worth of property mortgaged to the First Federal Trust Company to secure an original debt of $1,020,000, which then amounted to $780,000, and is now reduced to $679,014.18. If they had succeeded in wresting this property from the receiver and turning it over to the Trust Company, or failing in this, had compelled the receiver to sell it forthwith, it cannot be doubted that to satisfy this debt, more than $2,000,000 worth of assets would have been lost to the creditors.

The arrogant attitude and constant interference of the banks whose petitions and appeals have ham-

pered and retarded the administration of this estate, depreciated the values of its properties and almost paralyzed the efforts of the lower court and its receiver to effect a sane and speedy liquidation, and their ruthless determination to either seize the estate they had committed to the control of the Federal court, and sacrifice its values at foreclosure sale under the trust deed, or to control its management to meet their own ends,—are clearly disclosed by the letter of R. Spreckels, the then president of the First Federal Trust Company and of the First National Bank of San Francisco, and the then chief executive officer of the creditors' committee composed of representatives of the appellant banks here. This letter, written January 13, 1922, to the receiver, is in part, as we have seen, set out in Judge Farrington's opinion (Tr. p. 13) and is found in full on pages 80 and 81 of the transcript, and (omitting immaterial matters) may be emphasized by repetition:

> "Rudolph Spreckels,
> First National Bank Building,
> San Francisco.
>
> January 13, 1922.
>
> "The Creditors' Committee will have a representative here in a few days with full power to act and to cooperate with me. The Committee have come to the conclusion that we might as well call the creditors' agreement off and take immediate steps to secure control of the company's affairs or failing that to petition the court for an order to sell the properties. (The petitions referred to were subsequently

filed by the banks, were 11 in number and are referred to on pages 1-3 of the transcript.)

"The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by *actual purchase of the properties at foreclosure sale.* (Italics ours.) I know there will be no change from this determination and I would very much prefer to see matters arranged by agreement than to have the situation aired in court. * * *

Yours very truly,

R. Spreckels."

This letter failed in its purpose.

Mr. Smith is not the type of man to yield to the intimidation of individual wealth, or to be awed by the effrontery of corporate power.

Later, in 1923, these disappointed and malevolent banks, sought by another "Creditors' Agreement" to get control of the defendant company and its properties, but the attempt failed and the effort was abandoned for the reasons stated in the court's opinion. (Tr. pp. 10, 11.)

The temper and purpose of the appellant banks may be inferred from the statement of Mr. Greene, one of their attorneys, made immediately after the failure of the creditors' agreement just referred to, to the effect that if their plan to take over the management of the cattle company and its assets

had to fail, the creditors would get no more than between 25 and 50 cents on the dollar. (Tr. pp. 95, 96.)

Shortly after this remark of Mr. Greene, and to accomplish the purpose of the banks to sacrifice the properties of the cattle company at auction block sales, there were the petitions heretofore referred to directing the receiver to surrender the mortgaged property to the trustee for forthwith sale.

(b) Employment of J. W. Dorsey and W. E. Cashman as Attorneys for the Receiver.

Testimony of W. T. Smith, Receiver.

It was not my understanding that in the spring of last year (1923) Messrs. Dorsey and Cashman were representing me as receiver—not until the filing of the petitions for liquidation. (Petitions in Intervention.) Then for the first time I went and employed Messrs. Dorsey and Cashman to act for the Union Land & Cattle Company in my capacity as receiver. (Tr. p. 84.) * * * When I consulted Messrs. Dorsey and Cashman in 1924 it was after proceedings were commenced for the foreclosure of the mortgage and the application of the banks for the sale of the property, whatever time that was. I cannot tell you whether I had occasion to talk with Messrs. Dorsey and Cashman, it was about August, 1923, with reference to employment—I don't remember that. Assuming that the petitions of the banks were filed in August, 1923. I consulted with Messrs. Dorsey and Cashman with

reference to their representation of me as receiver, after those suits were commenced. (Tr. p. 85.) I should say it was immediately after. The nature of my consultation with them at that time was that I had talked with Judge Farrington and had advised that additional counsel be employed to represent the receiver in proceedings before the appellate court. I did not understand that my conference at that time amounted to an employment of Messrs. Dorsey and Cashman—not in the beginning, but afterwards I had authority to do it, then they were employed. * * * I think they only represented me as receiver until the case was decided in the appellate court. I talked to the Judge about the employment and I think Brown & Belford knew about it. * * * Messrs. Dorsey and Cashman were employed to appear for the receiver in the proceedings before the appellate court—before the Circuit Court of Appeals. Messrs. Dorsey and Cashman were not employed by me until the suits were brought and appeal taken to the appellate court—the United States Circuit Court of Appeals. (Tr. p. 86.)

Supplementing this testimony, we quote from Judge Farrington's opinion:

> "Petitions for orders directing the receiver to surrender the mortgaged property to the trustees, and to sell the remaining property forthwith, were denied, and appeals were speedily taken. The issues were of such vital importance that it was deemed expedient and necessary to employ additional counsel to assist Messrs.

Brown & Belford in the presentation of the receiver's cases in the Circuit Court of Appeals. Accordingly, the receiver was directed to retain Messrs. Dorsey and Cashman. They were familiar with all the evidence and the issues involved; they were also heartily in accord, not only with the theory that the Trust Company had waived the alleged default, notwithstanding the provisions against waiver in the trust deed, but that the receivership could not be a default within the meaning of the trust deed, if, when the receiver was appointed, the Court was not informed that under the trust deed such an order of appointment would constitute a default entitling the trustees to immediate possession of all the mortgaged property, with the right to sell it on such terms as they might fix." (Tr. pp. 14, 15.)

(c) Order Authorizing Receiver to Employ Additional Counsel.

The following is the order made by Judge Farrington upon this subject:

> "The receiver herein is authorized to employ such additional legal assistance as he may think necessary, connected with the three appeal cases, to wit, No. 4194, No. 4195 and No. 4196, pending in the United States Circuit Court of Appeals, for the Ninth Circuit, in which he as receiver is now interested as the appellee.
>
> Dated March 17th, 1924.
>
> E. S. FARRINGTON,
> District Judge."
>
> (Tr. p. 61.)

(d) Order Appointing Additional Counsel.

After the receiver was authorized to employ additional counsel, the court made a direct order upon the subject, in part as follows:

"J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals of the United States, for the Ninth Circuit, with full authority to represent the receiver therein, to wit: (Here follows the title of each of the appeals referred to.)

Dated this 26th day of March, 1924.

E. S. FARRINGTON,
District Judge."

(Tr. pp. 62, 64.)

(e) As to the Character and Value of the Services Rendered by J. W. Dorsey and W. E. Cashman Under Their Employment by the Union Land & Cattle Company and by Its Receiver.

At the hearing of the application of Messrs. Dorsey and Cashman for reimbursement and compensation, W. E. Cashman testified:

Testimony of W. E. Cashman, for Applicants.

"The WITNESS (on direct examination by Mr. Dorsey): J. W. Dorsey and W. E. Cashman were employed by the Union Land and Cattle Company to represent it in this receivership matter, in the case of the First National Bank of San Francisco v. Union Land and Cattle Company some time in May 1923. They performed services in the matter of the application of the First Federal Trust Company to sue the receiver which was filed in May of 1923. That matter occupied, I think, three different trial days in this court besides the preparation previous to the first hearing, and the preparations of necessity in between the several hearings and I think it terminated on the 9th day of July, 1923. The next matter was the application of the First Federal Trust Company for

an order of this Court directing the receiver to return the properties that were covered by the trust deed to the trustees named in the trust deed for the purpose of sale. That was filed some time in August, 1923. Then following that was an application made by the complainant in the action for an order for speedy liquidation. Following that an application was made by seven eastern banks for the same purpose. Those matters came on for hearing finally in October, and I think were submitted some time during that month. Then there was an application made by the receiver for leave to purchase livestock which was filed some time in October and heard in October and determined some time in November. Following that appeals were taken by the First Federal Trust Company, The First National Bank, and what I term the eastern banks, from the orders of the Court made denying the relief prayed for in their various petitions. Now, I have taken from my notes the days and dates, and some of the work that was done beginning with May 28, 1923, and carried down to and including April 8, 1924, which was the day following the date of the decision of the Circuit Court of Appeals. These services were all performed between May 28, 1923, down to and including April 8, 1924. They included the examination of authorities, witnesses, various trial dates in this court, preparation of statements of evidence to be used on appeal, preparation of transcripts, the examination of authorities on the appeals, and the preparation of the briefs that were finally filed in the Circuit Court of Appeals, and the preparation for argument in that court; and practically from May 28th to July 9th, practically every day of that time was consumed in work in connection with the trial of the first case, not only with me but with yourself; we were in constant consultation and con-

stantly at work upon the question involved in those various proceedings. It necessitated thirteen trips from San Francisco to Carson City and return. Up to the present time I paid the expenses of those trips, or advanced the money for them. The correct amount of moneys so advanced is $620.57. That was the actual outlay in carfare and hotel bills and a large part of that time we were entertained at private houses. During all of the time we had opposition in these matters, other attorneys opposing or contesting the petitions—all of the time these were strenuously contested. The first application was made by the First Federal Trust Company, McCutchen, Olney, Mannon & Greene representing petitioner at that time. On the second application that was made by the First Federal Trust Company, it was represented by Messrs. Jones & Dall. The applications of the various unsecured creditor banks were represented by McCutchen, Olney, Mannon & Greene's office, by Mr. Greene, by Judge Olney and Mr. Mannon, and Mr. Thomas was here, I believe, and Mr. Cassell. The firm of McCutchen, Olney, Greene et al. were present and litigated for one or others of the creditors in all of these applications at all of the hearings. Mr. Jones from the time that he became the attorney for the First Federal Trust Company, continued to serve it as its attorney, until the judgment or decree of the Circuit Court of Appeals. There were several attorneys of the firm of McCutchen, Olney, Mannon & Greene here at all times—at least two lawyers, and I am not sure but that on one or two occasions there were three. I may be mistaken about that. The office of Hoyt, Norcross, Woodburn & Henley was also present at all of these hearings and were present for the contesting banks."

(Tr. pp. 31, 34.)

"In all the proceedings to which Mr. Cashman has referred, including those referred to in connection with my employment by the receiver, I was acting exclusively for the Union Land and Cattle Company, from the beginning of the proceedings initiated by the filing of the petition to sue the receiver until, and only until we went, just before we went into the hearing of the case on appeal. I represented, I think, all the creditors in all things that I have done since I was first employed by the Union Land and Cattle Company, not only the particular creditors mentioned by us, and our own creditors, but your clients. I thought I knew I represented the First National Bank of Chicago, and I think I know I did. I think the attempt here was to destroy this institution, to sell this institution and I thought and still think that those proceedings would have resulted, if successful on your part, in destroying the value of the property, impoverish my clients, and hurt, I mean lessen the moneys that your clients would receive. I thought the course that I was taking was for the advantage of the creditors, and all of the creditors of the Union Land and Cattle Company. I was representing the company which owed these obligations to the creditors, and I acted in behalf of all the creditors, if that is what you mean. I was really employed by and acted for the company, and in the interest of the creditors, and that is the only interest I have." (Tr. pp. 38, 39.)

Answering a question by Mr. Greene:

"Mr. Dorsey. I don't think I said we don't expect to get money out of the hands of the receiver. I certainly expect in the protection of the property for the benefit of creditors to be paid, as a laborer would be paid, or a man

who saved your house from destruction, or saved your property from ruin; it is rendering a service in the interest of creditors." (Tr. p. 40.)

Testimony of M. R. Jones, Opposing Counsel and Attorney for the First Federal Trust Company, Called by Applicants.

(On direct examination by Mr. Dorsey):

"I have represented the First Federal Trust Company and Milton R. Clark, Trustees, from the time a petition for leave to intervene and sell the properties in the possession of the receiver was filed in this court and case on August 25, 1923. I have been present in a number of those hearings when these petitions were heard and I took part in the matters relating to the appeal. I prepared a brief myself and read the brief prepared by Mr. Cashman and Mr. Dorsey. In the preparation, or in the agreements which resulted in the transcript as filed, we had a number of interviews. I know generally the character of services that were performed in reference to the First Federal Trust Company matters and such matters as I saw in this court when I was here. I know generally what was done by myself and I saw and know generally what was done by other counsel so far as it related to the deed of trust. As to the other matters there were hearings here, I think, running over a week or two weeks following my petition and I was not present.

Q. Omitting those and considering that the work was done that you know something of, that you were a part of, what in your judgment is a reasonable compensation for those services?" (Tr. pp. 41, 42.)

* * * * * * *

"A. From the work that I think was done, I think that work ought to be fairly worth

somewhere between three and five thousand dollars." (Tr. p. 45.)

Testimony of A. Crawford Greene, Opposing Counsel and Attorney for the Petitioning Banks, Called by Applicants.

(Direct Examination by Mr. Dorsey):

"I am familiar with all the proceedings on these various petitions, the trials of them and appeals from them, the work that was done generally in the case by my firm, by Hoyt, Norcross, Thatcher, Woodburn & Henley, by Jones & Dall, and by Cashman and Dorsey; I have a general view of the situation as a lawyer.

Q. Mr. Greene, what would you charge your client for those services that were performed on behalf of the Union Land and Cattle Company, assuming that we did no work for any other person or corporation?" (Tr. p. 46.)

* * * * * * *

"WITNESS. I have been asked as I understand the question to fix, or to suggest a fee for particular services; my only experience with those with whom I have been associated, is that a fee must largely be determined by the success of the service rendered; its advisability and propriety; and in fixing a fee, I cannot fix it without reference to those facts. I was going to proceed to say to Colonel Dorsey, if he would give me a list of the dates on which a complete day's service had been given to his client, it becomes a very simple matter, from my basis of computation as to what he should receive as a per diem remuneration; but I don't think the service has resulted in a success which warrants much more than that from his point of view.

Mr. DORSEY. Q. Supposing it occupied throughout the time we have been employed, four months?

A. Well, that would depend very largely on what your basis of compensation is; on a per diem basis, that varies all the way, as you know, from fifty to five hundred dollars a day; and your past experience would be a better indication to you as to what you should receive for your services than any guess I could make as to what your services were worth.

Q. Do you care to say what those services were worth, in your judgment?

A. Services to the Union Land & Cattle Company?

Q. Yes.

A. Give me the length of time that has gone in on it.

Q. Exceeding four months constant time.

A. Well, I should think four months of your time, Colonel, ought to be worth the figures that Mr. Jones gave."

(Mr. Jones figures were from three to five thousand dollars.) (Tr. pp. 48, 49.)

Testimony of Samuel W. Belford, for Applicants.

"The WITNESS (On Direct Examination by Mr. Dorsey). I have been familiar with the affairs of the receivership since the appointment of Mr. Smith. I think that I have been in court each time that Mr. Dorsey has been in court since these controversies arose, beginning in May, 1923. I know what services were performed by Mr. Cashman and what services were performed by Mr. Dorsey.

Q. What, in your judgment, is the value of those services?

* * * * * * * *

A. I would say, Colonel, from what I know of that controversy, that your services ought to be worth at least ten thousand dollars, and possibly more. If they had been rendered for

me as a private client, and I had the money to pay for them, I would pay more than that." (Tr. p. 65.)

In the controversy following the testimony of Messrs. Cashman, Dorsey, Jones, Greene and Belford, Mr. Dorsey said:

"I think all I have to say is that I realize the need for economical administration of the affairs of this receivership; I know every dollar that is spent is a dollar taken from the creditors. I think that every man who labors for the benefit of the receivership should receive some reasonable compensation, but it should not be excessive; it should be borne in mind always that this company is poor, that it is not able to pay all of its debts, and I think everybody should be content to receive a bit less than he would ask if he was working for a wealthy client. I say that particularly in view of the fact that we have applied for compensation; and I would like the Court to understand that all we ask for, and whatever conclusion the Court should come to, if it should think we are entitled to anything in any capacity, all we ask for is a very reasonable or very moderate compensation considering the services we have rendered. I say that for one reason because of what was said here at the time the effort to return the properties to the company failed. I know that it came before this court, and went out before the people interested, that the people who were to take over the management, who elected themselves, or had themselves elected officers of the corporation, saddled at once upon the company a very large sum of money, in the aggregate something like $100,000 or more. I know that some of those fees were large, and

were fees asked for services rendered solely and wholly for creditors, and not for the company; solely and wholly to put the company in the hands of the men who sought to control it and not in the interests of the company, I believe. I know that Mr. Moffat, who was president of the company, objected to the allowance, or the consideration of allowing any such sums of money that were demanded; and I know that he has had in mind always that whatever is done here should be done at the least overhead, the least possible expense, and all in the interest of the company, of this receivership. And feeling as I do toward Mr. Moffat, and knowing the condition of this company, I ask the Court, if it gives us anything at all, to consider that view. All we ask and all we want is a very moderate compensation for services.

Mr. GREENE. Are you now asking for compensation for services rendered to the receivership or not?

Mr. DORSEY. I have presented my views on that.

Mr. GREENE. You filed a petition first asking for compensation; you then asked to have that part stricken, and I understand now you are asking for it. I want to get clear whether you are or are not asking.

Mr. DORSEY. I am asking the Court to allow us for services performed. Upon what ground he makes that allowance is for the Court to determine. I am confident any service rendered for properties in the hands of a receiver, that tends for the benefit of those properties, and for the benefit of the creditors, is entitled to compensation. That is my view, and I think I would be entitled to ask for fees as attorney for the company, and that I would be entitled to ask for fees if I, a creditor of this company, should come in without being asked, and should

force my way into the litigation, and it should result in saving to the creditors large sums of money, or benefit the estate, and would be entitled to have back my expenses, and a reasonable compensation.

Mr. GREENE. Am I correct in understanding that you do not urge the allowance to yourself as counsel for the receiver?

Mr. DORSEY. You are not correct in anything you have said concerning that subject. I am asking for compensation for services performed. The services I performed primarily for the company; if I did anything in aid of the receiver, it was because the receiver and I were in accord with this phase of the matter. Both of us wanted to conserve these assets; both thought these properties would be taken away, and would be utterly destroyed; we were working together; whatever he said to me was for the benefit of this company; whatever I said to him was for the benefit of the receivership; what we discussed, my aim and his, was to benefit the creditors; and I said to you yesterday, your creditors as well as mine.

Mr. GREENE. Am I to understand that the request or motion you made eliminating from your petition any request for compensation to you on account of services to the receiver, stands as an elimination, or that you desire it restored?

The COURT. I want to say now I am responsible for the appointment of Mr. Dorsey, and I feel that he rendered very valuable service, and my intention is to make an order compensating him for his services. Of course if he refuses to take the money that is his affair; but he has rendered the service at the request of the receiver and at my request, and we are in duty bound to remunerate him. That is the way I look at it, and I feel he has rendered valuable service. Of course, if he and his asso-

ciate refuse to take the money, I have no way of compelling them to take it if they don't want it." (Tr. pp. 75, 76, 77, 78.)

In his opinion concerning the employment of Messrs. Dorsey and Cashman, Judge Farrington said:

"The services performed by them were not only exceedingly valuable, but they are deserving of much larger compensation than the $2500 which I here allow. To argue that their assistance was unnecessary and the employment unwise, might perhaps be regarded as depreciating the ability and legal skill of the array of eminent and confident counsel opposed to the four attorneys representing the receiver." (Tr. p. 15.)

III.

THE COURT MAY PROPERLY ALLOW, AND WHEN APPOINTED BY HIM OR BY HIS AUTHORITY, SHOULD ALLOW, COUNSEL FEES AND EXPENSES INCURRED IN PROTECTING AND PRESERVING OR INCREASING THE FUND UNDER ITS CONTROL.

Petersburg Sav. & Ins. Co. v. Dellatorre, 70 Fed. 645;

Stuart v. Boulware, 133 U. S. 78; 33 L. Ed. 568;

Woodruff v. New York L. E. & W. R. Co., 29 N. E. 251;

Attorney General v. North American Life Ins Co., 91 N. Y. 57, 64-5;

Woodruff v. New York L. E. & W. R. Co., 10 N. Y. Supp. 305;

Trustees v. Greenough, 15 Otto 527; 26 L. Ed. 1157;
Burden Central Sugar Refining Co. v. Ferris Sugar Mfg. Co., 87 Fed. 810;
Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850;
Lamar v. Hall & Wimberly, 129 Fed. 79;
2 *Foster's Fed. Prac.,* Sec. 421;
Code of Civil Procedure, Sec. 796.

It was not until the petition for leave to sue the receiver was filed herein in May, 1923, by the First Federal Trust Company and Milton R. Clark, trustees, that the Union Land & Cattle Company employed J. W. Dorsey and W. E. Cashman to represent it and its creditors by preventing the petitioners from foreclosing the security held by them, or from interfering with the company's assets in the hands of the court through its receiver.

Prior to that time during the receivership the company and its stockholders were without legal representation.

Subsequently, on August 25, 1923, the First Federal Trust Company and Milton R. Clark, as trustees under the trust deed, filed their petition for leave to intervene and to sell properties in the hands of the receiver; on the same day the First National Bank of San Francisco filed its petition for an order directing liquidation and sale of properties, and on August 31, 1923, the seven eastern banks appearing here filed their several petitions

for leave to intervene and for an order directing liquidation and sale of properties. (Tr. pp. 1-3.)

These petitions in intervention were to the end that a default under the terms of the trust deed should be declared and the properties covered by this security turned over to the trustees, or failing in this, that all the properties of the Cattle Company in the hands of the receiver should be forthwith sold.

These petitions were denied and appeals were taken to the United States Circuit Court of Appeals. It was after this, and when the appeals were pending in the latter court, and when briefs must be prepared, and when it was thought necessary by the receiver and by the lower court that additional counsel for the receiver, who were, and because they were, familiar with the history of the case—located in San Francisco where the appeals were to be heard —should be employed.

It was, of course, known that J. W. Dorsey and W. E. Cashman believed the receiver had discharged the duties of his office in direct accordance with the order of his appointment with unswerving devotion to every interest involved—the creditors, secured and unsecured, the cattle company, its stockholders, and to the court controlling the administration of the estate, also that these attorneys were in hearty sympathy with and full concurrence in the legal conclusions announced and the views expressed by the court in its opinion and order in

appeal herein No. 4194, so forcibly characterized by Judge Rudkin in *First Federal Trust Company v. First National Bank of San Francisco,* 297 Fed., on page 356, as follows:

> "The trustees are seeking to disrupt and disorganize the business of the company, thereby causing irreparable loss and injury to the unsecured creditors, the very object the receivership was invoked to prevent. That such a claim is inequitable and unjust does not in our opinion admit of doubt or question."

The appellate court affirmed the order of the trial court that there was no default and in denying the right of the trustees to sell under the deed of trust.

In these circumstances, are the attorneys employed entitled to compensation for their services?

When the petitions in intervention were filed there was a threatened, apparent, and immediate danger of waste and loss of the whole estate in the hands of the receiver. These properties were rescued and restored to the purposes of the trust.

The sole purpose of the employment of counsel was to prevent *forthwith* and calamitous sales and to keep the estate under the administration of the court for orderly and speedy liquidation.

Obviously, all of the creditors, including the appellants and excepting only the First Federal Trust Company, which would have confiscated $3,000,000 worth of property to satisfy a then debt of $780,000.

These attorneys were in all employments by the cattle company, by the receiver, and by the court,

charged with a duty to protect the general interest —to guard the estate in *gremio legis* for equitable distribution by its chancellor. They did not come in representing their personal rights; they were authorized to speak for the creditors, for the receiver, and for the preservation and protection of the properties in his hands, and for the common benefit to prevent spoliative attempts to wreck the receivership.

In the case of *Petersburg Sav. & Ins. Co. v. Dellatorre,* 70 Fed. at page 645, it is said:

> "It is a general principle that when a trust fund is brought into court for administration and distribution, it must bear the expense incurred in proper proceedings taken for the purpose. That expense necessarily includes reasonable counsel fees. The counsel not only represents the complainant, who employs him to represent his interest in the suit, but he incidentally represents all others having a common and like interest in the suit and in the fund brought by it into court, and who avail themselves of his services and share in the benefits. It is but equitable and just that he should be compensated by all parties thus interested and that he should have a lien on the fund for his compensation to the extent of their interest in it."

In holding that counsel fees are proper allowances to a receiver for counsel employed by him in the discharge of his duties, the Supreme Court of the United States, in *Stuart v. Boulware,* 133 U. S. 78, 33 L. Ed. 568, on page 570 said:

> "Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and *the action of the court below is treated as presumptively correct, 'since it has far better means of knowing what is just and reasonable than an appellate court can have,'* as was remarked by Mr. Justice Bradley in Trustee v. Greenough, 105 U. S. 527, 537 [26 L. Ed. 1157, 1162], where the subject is considered."

In *Woodruff v. New York L. E. & W. R. Co.* (on appeal), 29 N. E. 251, the court said:

> "It is a cardinal principle in the disposition of trust estates that the trust fund shall bear the expenses of its administration, and that one who successfully conducts a litigation in *autre droit* for the benefit of a fund shall be protected in the distribution of such fund for the expenses necessarily incurred by him in the performance of his duty. * * * This right is extended, not only to necessary traveling expenses, but to all reasonable fees paid for legal advice in the discharge of his duties, and in most of the states includes compensation for time, labor and trouble."

It may fairly be said that Messrs. Dorsey and Cashman, aiding Brown & Belford as attorneys for the receiver, and representing the cattle company, preserved and kept the court and receiver in the control and possession of the huge properties mortgaged to the trust company.

In *Attorney General v. North American Life Ins. Co.,* 91 N. Y. 57, 64-5, it is held that the principle upon which counsel fees are granted where suits are brought or defended by persons acting *en autre*

droit (as representing others) stands upon the same ground as other necessary expenses of the preservation of the fund.

> "In an action or special proceedings for the administration of a fund *in the hands of the court* where a judicial apportionment or determination of rights is necessary for this purpose, the costs, *counsel fees,* and expenses of all necessary parties are *a lien and charge upon the fund.*"

In *Woodruff v. New York L. E. & W. R. Co.,* 10 N. Y. Supp. 305, the court says at 309-10 (referring to *Attorney General v. Insurance Company,* ante):

> "But the opinion expressly recognizes the rule that the court in its control of a fund is bound to recognize every substantial equity and every existing right in providing for the distribution of the fund. Equity was denied existence on that application (still referring to the case cited) as the petitioners had brought no fund into court, were not parties to the original action, and had simply intervened to protect personal rights. The present application presents different features. Plaintiff was the prosecutor in the original action and in the last. The settlement of the issues have adjudged that the party in occupation of the property—the primary security—must pay for such use and occupation, not only for the interest due, but the bonds as well. Plaintiff comes into court bringing a fund, the result of his exertions, and in this fund he has no personal interest, except to distribute it as trustee. This seems, therefore to be a case where equity and justice press for recognition, and is within the spirit of that decision."

Although neither the attorney nor the receiver brought a fund into court in this case, a precisely analogous thing was accomplished; they prevented property from being taken from the claimant who would probably have exhausted the mortgaged properties, valued at $3,000,000, to satisfy its then debt of $780,000—now reduced to $680,000—to the loss of every other creditor of the company.

In *Trustees v. Greenough,* 15 Otto 527; 26 L. Ed. 1157, the Supreme Court of the United States, through Mr. Justice Bradley, said:

> "As to the point made by the appellants, that the complainant is only a creditor seeking satisfaction of his debt, and cannot be regarded in the light of a trustee, and, therefore, is not entitled to an allowance for any expenses or counsel fees beyond taxed costs, as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done, and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust,* and to have secured its proper

application to their use. There is no doubt from the evidence, that besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution."

Central R. R. etc. v. Pettus, 113 U. S. 116, 28 L. Ed. 915;

Missouri & K. I. Ry. v. Edison, 224 Fed. 79, 82.

In the case of *Burden Central Sugar Refining Co. v. Ferris Sugar Mfg. Co.,* 87 Fed. 810, the court in holding that the solicitors for a creditor who had commenced suit against an insolvent corporation, in its behalf, and in behalf of all other creditors who might intervene and contribute to the expense, and procure the appointment of a receiver and in holding that such solicitors were entitled to compensation out of the general fund for the services rendered after, as well as those rendered before, the appointment of the receiver—said at pages 811, 812:

> "One jointly interested with others in a common fund, who in good faith maintains the necessary litigation to save it from waste, and secures its proper application, is entitled in equity to the reimbursement of his costs, as between the solicitor and the client, either out of the fund itself, or by proportionate contributions from those who receive the benefits of the litigation." (Citing authorities.)

The following excerpt is peculiarly applicable to this case, quoted from *Robinson v. Mutual Reserve Life Ins. Co.,* 182 Fed. 850, at page 864:

> "The allowances made by the special master to the receivers and to the complainants' counsel seem at first sight large in comparison to the amount of the fund; but for nearly three years the receivership has moved smoothly and successfully over many rough places. It bristled with legal and business complications which were surmounted only by the patience and intelligence of all concerned, conspicuously of the receivers and of the counsel for complainants. I think the amount of the allowances fully justified. There is an exception to any allowance to the counsel of complainants for services after the appointment of receivers. It is said that the claim of the complainants after that time was hostile to the claims of other creditors, and therefore that they ceased to represent all concerned. This is true so far as questions of priority are concerned, but not as to the general conduct of the cause. Mr. Winslow's services of this character were so helpful that I would strain a point, if necessary, to sustain the allowance; but authority is found for it in Burden Co. v. Ferris Co., 87 Fed. 810."

In this case, as in the *Robinson* case, the receivership has moved over many rough places and has bristled with legal and business complications. In that case an allowance was made to the counsel of the *complainant* for services after the appointment of the receiver, which means that counsel for the First National Bank would be entitled to an allowance if the efforts of such counsel had protected the property in the hands of the receiver from waste or destruction, or had brought an additional fund into the estate of the receiver.

Shainwald, Assignee, v. Lewis, 8 Fed. 878.

In *Lamar v. Hall and Wimberly,* 129 Fed. 79, it is said, pages 82, 83:

> "Executors, administrators, guardians, *receivers,* and other trustees being the agents and legal representatives of the beneficiary or beneficiaries of the trust, are allowed credit for necessary and reasonable charges, including attorney's fees, incurred by them in the *protection* and administration of the trust fund. The same principle is extended to other cases. One jointly interested with others in trust property, who in good faith maintains for himself and others interested like him, the necessary litigation to save it from waste and to secure its proper application, is entitled to the reimbursement of his costs, as between solicitor and client, out of the fund to be administered."
>
> *Trustees v. Greenough,* 113 U. S. 116; 28 L. Ed. 915.

In 2 *Foster's Fed. Practice,* Sec. 421, it is said:

> "Costs are paid out of a fund or estate in the course of distribution by a court of equity,

> to trustees who have been obliged to engage in litigation for the benefit of the estate and to persons who have been successful in suits brought by them on behalf of themselves and others similarly situated. * * *
>
> "Costs will also be paid out of a fund under the control of a court of equity to persons who have been successful in a suit concerning it, brought by them in behalf of themselves and others similarly situated with them. * * *
>
> "Costs have been allowed in a similar case to a party who by his litigation had benefited the fund, although he eventually failed to collect his own claim against it."

Section 796 of the *Code of Civil Procedure* of the State of California relating to partition suits, declares the general equity rule in cases where moneys have been expended or services rendered for the common benefit. That section provides:

> "The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees and other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein."

IV.

APPELLANTS' AUTHORITIES ON PAGES 14 TO 18 OF THEIR BRIEF ARE INAPPLICABLE TO THE FACTS OF THIS CASE.

It may be admitted that if contests had arisen or shall arise between claimants in respect to priorities or the right to share in the distribution of the funds in the hands of the receiver, such contests

would be individual in character as involving antagonistic interests, and it is such cases that the appellants rely upon.

Here neither Mr. Dorsey nor Mr. Cashman was, nor had either of them ever been, the attorney for the plaintiff; they had no interest in the receivership proceedings or in any of the parties or persons interested therein at the time of their employment, other than to protect and preserve the insolvent estate. The court and the receiver were vitally interested in keeping the properties covered by the trust deed in the possession of the receiver and under the control of the court for equitable distribution among all the creditors in accordance with their respective claims and priorities. The cattle company was, as it is and always has been, anxious to have its creditors paid to the last farthing in value the property will bring.

The interests of the receiver and of the cattle company were identical, and there was not the remotest probability that they will ever be conflicting.

Messrs. Dorsey and Cashman were familiar with all that had been done in the receivership since the appointment of the receiver on July 28, 1920.

The cases and text books the appellants cite and rely upon do not support their contention. For example: *High on Receivers,* (4 Ed.) p. 188, at page 217, quoted from by counsel, says:

> "It has been held reversible error to make an allowance of counsel fees to a receiver's

> attorney who also represented the plaintiff in the action."

That is not the case here.

In *Vieth v. Ress,* 82 N. W. 116, cited in appellants' brief, pp. 15 and 16, the court held:

> "The interests of the debtor and creditor are conflicting and the same attorney cannot with propriety act for the receiver who represents both. * * * We think the law upon this subject is correctly stated by Beach in his work on the Law of Receivers (Alderson's Ed., 1897). At page 274 the learned author says: 'The same reasons which suffice to render the legal adviser of one of the parties to an action ineligible to be appointed receiver operate, also, to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his client, will, in most cases, if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties, such as cannot be properly performed by one person.'"

In this matter, it was the desire of the company to protect and preserve the properties sought to be taken over by the trustees or sold at *forthwith* sale, and the interest of the cattle company was in harmony the duty of the court and of the receiver.

Counsel for appellants quote fully from *Adams v. Woods,* 8 Cal. 306, on page 17 of their brief, but miss the point involved here. In that case there was a flagrant attempt to evade the salutary rule

that one cannot in a court of equity ask for compensation from a fund in *custodia legis* when representing conflicting interests in that fund.

Stanley, the petitioner for a fee, was in the employment of the plaintiff, Alvin Adams, and acting as his counsel; Naglee was the receiver. The court says, page 319:

> "Adams and the receiver clearly occupied very different positions with respect to the fund (in the hands of the receiver) and the claims upon it. When, therefore, Shafter & Park subjected themselves to the receiver's counsel, they placed themselves in a false position. It was the duty of Naglee to do entire justice to all parties. He had no interest in defeating just claims, or in allowing those that were unjust. His position was that of perfect impartiality. But it was not so with Adams. It was his pecuniary interest to defeat all the claims. Besides that, it was his interest to make the receiver liable, if he could. Suppose that Adams should wish to call in question the acts of the receiver, in those very cases where Shafter & Park advised and acted as his counsel. It would certainly place the counsel in a most embarrassing position."

There is not the slightest similarity between that case and this. By no possibility could Messrs. Dorsey and Cashman be placed in a false position, or be suspected of attempting to serve two masters, or be required to occupy inconsistent positions. Here the claims of all creditors had been ascertained, regularly presented, allowed by the receiver and by

the court, and the allowance consented to and approved by the cattle company.

The cattle company's and the receiver's employment were precisely for the same purpose—to resist the claim and contention of the First Federal Trust Company and of the appellant banks that a default in the trust deed had been committed, or that the estate in the hands of the receiver should be sold at auction sales.

Certainly, it cannot be made to appear that actual injury or unfairness has resulted to a party to the action or to the receivership fund. Judge Rudkin said that the claim of the First Federal Trust Company, and, therefore, the demands of the banks which supported it in the attempt to take the mortgaged properties from the lower court and its receiver, were disruptive, inequitable and unjust to the creditors of the cattle company, and it cannot be said that any injury has resulted to the fund in the hands of the receiver.

As said in Section 631 of *Tardy's Smith on Receivers,* the very section relied upon by counsel for appellants:

> "The reason for the rule [which has no application here] is the possibility that there may arise situations in the course of administration in which there would be a conflict of interest between the party whose attorney is selected and other parties to the action, a situation in which the receiver is supposed to be impartial. The character of the duties to be mainly performed by the attorney [as here] may remove

> the necessity for following the rule. * * * In case a conflict of interest arises or appears probable, it is within the power of the court to compel a change of attorneys.
>
> "Oftentimes the receivership proceeding is the consummation of vigorous efforts on the part of plaintiff's attorney to force into the open an unwilling debtor, as, for instance, where one has concealed or fraudulently transferred his assets [a situation not more persuasive than the one causing the employment of Messrs. Dorsey and Cashman].
>
> "In such case the rule is 'more honored in its breach than it would be in its observance', and wisdom dictates that the receiver should have the benefit of the knowledge gathered by the attorney prior to the appointment of the receiver."

In the note to the section from which we have quoted, it is said:

> "A receiver may, without impropriety, be represented by the attorney of a party where the interests of the receiver and such party are not adverse." (Citing cases.)

In *C. J. Turner Lumber Co. v. Toomer*, 275 Fed. 678, the court says, pages 679, 680:

> "The record does not disclose any conflict of interest between parties to this cause which would present a legal reason why a judge should refuse to permit attorneys for a party to act as attorneys for the receiver. Conceding the rule that generally such dual representation should not be allowed without permission of the court, there is no rule that under no circumstances should an attorney for a party act as attorney for the receiver. In some cases an attorney for one of the parties can give the

most efficient service to a receiver without any conflict of duty. Shainwald v. Lewis (D. C.), 8 Fed. 878.

"This record does not show but that the employment of these attorneys by the receiver was actually known by the court. Where the court could have authorized this employment, he could approve such employment, made under a general authority, and the order of the court awarding compensation is such an approval. Stuart v. Boulware, 133 U. S. 78, 81, 10 Sup. Ct. 242, 33 L. Ed. 568.

"The record does not show but that the court was fully advised as to the services rendered by receiver's counsel and of their value. The introduction of evidence was not essential to a decree fixing such compensation. 34 Cyc. 466."

In *In re Smith,* 203 Fed. 369, the court, relying upon Beach on Receivers, High on Receivers, Alderson on Receivers and Loveland on Bankruptcy, says, page 372:

"The general rule is that a receiver may not employ the solicitor of either of the parties to the suit in which he is appointed (Beach on Receivers, Sec. 262); and this rule applies to trustees. But it is only when the receiver is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. Beach on Receivers, Sec. 263; High on Receivers, Sec. 217; Alderson on Receivers, Sec. 233. The general rule doubtless is that a trustee or a receiver should not ordinarily employ the attorney who represents the bankrupt, or an attorney who represents interests in the litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee (Loveland on Bankruptcy, 4 Ed. p. 257); and where there are matters in controversy between different classes

> of creditors, the court will usually decline to authorize the employment by the trustee of an attorney representing one of such classes. In re Rusch (D. C.), 105 Fed. 607."

Nor does *McPherson v. United States,* 245 Fed. 35, support the contention of the appellants' counsel. On page 41 the court says:

> "The general rule that a receiver should not employ counsel of either party is limited to cases of adverse interest (In re Smith, 203 Fed. 369; Alderson on Receivers, Sec. 233) and has no application to proceedings such as taken here, to recover property fraudulently conveyed."

Nor to prevent property from being seized and wasted.

The rule relied upon by counsel as stated on page 291 of 34 *Cyc.* is subject to the qualifications we have referred to in other cases.

In Note 49, 34 *Cyc.,* page 292, it is said that

> "It was only when the receiver was acting adversely that it had ever been supposed that there was any impropriety in employing the counsel of a party, and it was indicated that if any general practice ever existed which prohibited the appearance by the solicitor of one of the parties for the receiver, it had been disregarded almost daily for many years."

In *Adler v. Seaman,* 266 Fed. 828, another of the cases relied upon by counsel for appellants, the court says on page 843:

> "The attorney for a receiver is an officer of the court, chosen by the court, and must exer-

> cise the duties of his position impartially, with an eye single for the proper and successful conduct of the receivership. * * * The trial court, which must conduct this receivership, is presumed to have been familiar with his qualifications and impressed with the conviction that his services would be impartial and efficient."

Ryckman v. Parkins, 5 Paige Ch. 543 (3 N. Y. Ch. Rep. 822) is an equally unfortunate citation.

On page 545, 5 Paige Ch. (3 N. Y. Ch. Rep. 824), the court says:

> "As between party and party, the counsel for the complainant has in no case a right to be paid for the counsel services out of a fund belonging to a defendant, *except where the counsel has been employed to obtain or create such fund for the joint benefit of both parties.*"

Here, counsel were employed to retain and to prevent the loss of almost the entire fund in the possession of the receiver for the benefit of all creditors.

V.

REPLYING TO THE STATEMENT THAT MESSRS. DORSEY AND CASHMAN AT THE HEARING WITHDREW ALL CLAIM FOR SERVICES RENDERED TO THE RECEIVER UNDER THE ORDERS OF THE COURT (PP. 18-21, APPELLANTS' BRIEF).

It may be said that the statement made by Mr. Dorsey, in response to questions propounded by counsel for appellants, set out on pages 18 and 19 of appellants' brief, correctly portrays Mr. Dor-

sey's state of mind. But he spoke for himself alone. Mr. Cashman was an independent attorney for the receiver, and, though present in court, did not concur in Mr. Dorsey's statement relating to his claim against the receiver.

Mr. Dorsey's position was that he had acted in his employments in the interest of all the creditors to prevent the disruption and loss of the fund in the receiver's possession, and that what he had done might be regarded as having been done in his employment by the company, whatever benefit may have resulted to the receiver; and that the value of his services could not be apportioned between the cattle company and the receivership.

But in the last analysis the service was to prevent the withdrawal of almost the entire fund of the receivership.

Whatever Mr. Dorsey's attitude in the premises, the court concluded, probably, that inasmuch as the cattle company was penniless and the employment was by its order and the services rendered were for the benefit of the creditors by preventing depletion of the fund possessed by the receiver, payment should be made directly from that fund. Judge Farrington said:

> "I said plainly * * * the order would be made allowing compensation, because Mr. Dorsey had rendered exceedingly valuable services to this estate, and had rendered them at the request of the court, and on the order of the court, and at the request of the receiver. Mr.

> Belford [one of the original and now attorneys for the receiver] coincided with that view."

It may be added that there was no change of position by appellants because of anything said by Mr. Dorsey, and therefore, no estoppel can be asserted.

VI.

THE RECEIVER WAS FULLY AUTHORIZED, JUSTIFIED, PROTECTED AND DIRECTED IN MAKING THE EMPLOYMENT.

In the order of his employment made July 28, 1920, he was authorized and empowered

> "To employ such * * * assistants and *attorneys* as he may deem necessary or proper."

The order of the court, filed March 17, 1924, is that

> "The receiver herein is authorized to employ such additional legal assistance as he may deem necessary, connected with the three appeal cases", etc. (Tr. p. 61.)

Messrs. Dorsey and Cashman were directly employed by the court to perform the services for which they asked compensation, by the order of the court filed March 26, 1924:

> "J. W. Dorsey and W. E. Cashman are hereby appointed additional counsel for the receiver in the following cases now pending in the Circuit Court of Appeals for the Ninth Circuit, with full authority to represent the receiver therein", etc. (Tr. pp. 62, 64.)

It is respectfully submitted that if Messrs. Dorsey and Cashman had not been employed by the receiver nor appointed by the court, but as mere volunteers had performed the services they in fact did render, and thus had aided in frustrating the attempt of these appellants to force instant liquidation at forced sale,—they would have been entitled to reimbursement and payment from the fund in the receiver's hands.

40 *Cyc.* 2808;

Civil Code, Sec. 3521.

VII.

THE APPEAL SHOULD BE DISMISSED.

(a) As to J. W. Dorsey and W. E. Cashman against whom no relief is sought and who are improperly made appellees—if in fact it is intended to make them appellees by the part of the title of the appeal reading "and *to* J. W. Dorsey and W. E. Cashman";

(b) As to W. T. Smith, because it appears that the appointment of J. W. Dorsey and W. E. Cashman, as attorneys for the receiver, was made directly by the court;

(c) As to Union Land & Cattle Company because that company, as such, was not a party to the proceeding made the subject matter of the appeal;

(d) As to all of the appellees, because the appointment of and payment to J. W. Dorsey and W. E. Cashman was within the jurisdiction of the court, and no abuse of discretion in the exercise of that jurisdiction is assigned or shown; and because the appellant banks through their counsel, both in the appeals in the Circuit Court of Appeals and in all subsequent proceedings before the lower court, participated therein, knew of the appointment of J. W. Dorsey and W. E. Cashman and that they were acting attorneys for the receiver, did not object, but, therefore, consented thereto, and are now estopped.

It is submitted:

First, That the appeal should be dismissed; or

Second, That the order appealed from should be affirmed.

Dated, San Francisco,
February 13, 1925.

J. W. Dorsey,
W. E. Cashman,
In Propriis Personis and as Attorneys for Appellees.
S. W. Belford,
Geo. S. Brown,
Attornēys for All Appellees.

No. 4410

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation, W. T. SMITH, as Receiver of said UNION LAND AND CATTLE COMPANY, Under and by Virtue of That Certain Order Given and Made by the District Court for the District of Nevada, on July 28, 1920, SILVERIA GARAT, W. T. HITT, EMMA McLAUGHLIN, HENRIETTA MOFFAT, MAUD B. CLEMONS, FRANCES C. RICKEY, W. A. DILL, W. H. FRAZER, ELIZABETH SHARP, MRS. ALOYSIUS DAVEY, and J. W. DORSEY,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4410

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Appellants,

vs.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Assignment of Errors 66

Bond on Appeal 71

Certificate of Clerk U. S. District Court to Transcript of Record 80

Citation 82

Entry Order Approving and Ratifying Purchase of Lesher Property 4

EXHIBITS:

Receiver's Exhibit "C" — Contract Dated June 23, 1922, Between Robert M. Lesher and George H. Calligan 38

Minutes of Court—June 20, 1924—Entry Order Approving and Ratifying Purchase of Lesher Property 4

Names and Addresses of Attorneys of Record .. 1

Opinion 5

Order Allowing Appeal and Fixing Bond on Appeal 65

Order Approving Bond on Appeal 73

Order Approving Statement of Evidence 61

Order Authorizing Receiver to Make Final Payment on Lesher Property 19

Index. Page

Petition for Appeal and Order Allowing Same. 63
Petition for Payment on Lesher Property..... 1
Praecipe for Transcript of Record..... 76
Statement of Evidence 27
Stipulation and Order That Exhibits may be Sent Up as Part of Record on Appeal.... 74
Stipulation Re Statement of Evidence..... 59

TESTIMONY ON BEHALF OF RECEIVER:
MOFFAT, W. H. 51
PETRIE, H. 48
Cross-examination 50
SMITH, W. T. 29
Cross-examination 43
Redirect Examination 46

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. McCUTCHEON, OLNEY, MANNON & GREENE, Balfour Building, San Francisco, Calif., and Messrs. THATCHER & WOODBURN, Reno, Nevada,

For the Plaintiff in Error.

Messrs. J. W. DORSEY and W. E. CASHMAN, Royal Insurance Building, San Francisco, Calif., and Messrs. BROWN & BELFORD, Reno, Nevada,

For the Defendant in Error. [1*]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B-11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND & CATTLE COMPANY, a Corporation,

Defendant.

PETITION FOR PAYMENT ON LESHER PROPERTY.

Comes now W. T. Smith, receiver of Union Land & Cattle Company, and alleges:

*Page-number appearing at foot of page of original certified Transcript of Record.

That on, to wit, the 28th day of July, 1920, he was duly and regularly appointed receiver of Union Land & Cattle Company, the defendant above named, and of its property and assets, and that ever since said date he has been, and is now, the receiver of said Union Land & Cattle Company;

That heretofore and during the months of October and November, as such receiver, he paid to Messrs. Brown and Belford the sum of $7,500.00 as a payment on account for services rendered by said firm as attorneys for the Receiver; that he paid to Mr. George K. Edler the sum of $6,500.00 on account for services rendered by the said George K. Edler as accountant and in connection with certain tax matters involving the property and assets of said Union Land & Cattle Company; that he paid to himself on account of salary and compensation as receiver of said Union Land & Cattle Company, the sum of $24,000.00.

And your petitioner further avers that there is due and owing to R. M. Lesher the sum of $4,241.33 which is payable to the said R. M. Lesher on June 21, 1924, on a certain contract for the purchase of certain real property by said W. T. Smith as receiver of said Union Land & Cattle Company, which in the opinion [2] of said receiver was, and is, necessary to the land holdings and to the business of said Union Land & Cattle Company, and in this connection your petitioner alleges that heretofore he has been paid on said contract the sum of $4,241.33 in accordance with the terms of said contract.

And your petitioner alleges that there is due and payable to Mr. Charles P. Haines the sum of $2,000.00 for services rendered by the said Charles P. Haines for and at the request of your petitioner as counsel for your petitioner in certain tax matters affecting the estate of said Union Land & Cattle Company.

Your petitioner further alleges that all of said sums so paid were necessary to be paid in the interest of said receivership estate and that the sums which he desires to pay are necessary and proper payments to be made in the conduct of said receivership and for the benefit of said receivership estate.

WHEREFORE, your petitioner prays that upon the filing of this petition this Court may make and enter its order directing and fixing the time for the hearing of said petition and the notice to be given of the filing of said petition and of the date of its hearing, and that upon the hearing of said petition that this court shall make and enter its order approving the payments heretofore made and authorizing and directing your petitioner, as such receiver, to pay said sum of $4,241.33 to the said R. M. Lesher and the sum of $2,000.00 to the said Charles P. Haines.

W. T. SMITH,
Receiver, Union Land & Cattle Company.
BROWN & BELFORD,
Attorneys for Receiver. [3]

[Endorsed]: In Equity—No. B–11. In the District Court of the United States, in and for the Dis-

trict of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land & Cattle Company, a Corporation, Defendant. Petition. Filed May 26, 1924. E. O. Patterson, Clerk. Brown & Belford, Attorneys for Receiver. [4]

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Plaintiff,

vs.

UNION LAND & CATTLE COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JUNE 20, 1924—ENTRY ORDER APPROVING AND RATIFYING PURCHASE OF LESHER PROPERTY.

At this point Mr. Belford calls the attention of this court to the fact that on to-morrow, the last day for the final payment on the Lesher property, the receiver would either have to make said payment or throw up the contract and lose the said property on which already Six Thousand ($6,000.00) Dollars has been made, and he asks the Court for its decision upon the hearing in this matter. Thereupon, IT IS ORDERED that the purchase of the Lesher property by the Receiver for the Union Land & Cattle Company be, and the same is hereby ap-

proved and ratified; that the purchase be completed and the final payment be made in accordance with the contract. And IT IS FURTHER ORDERED that the payments of Six Thousand ($6,000.00) Dollars heretofore made by the receiver be, and the same is hereby approved, ratified and confirmed. [5]

In the District Court of the United States in and for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND & CATTLE COMPANY, a Corporation,

Defendant.

OPINION.

McCUTCHEN, OLNEY, MANNON & GREENE, HOYT, NORCROSS, THATCHER & WOODBURN, for Creditors: Old Colony Trust Company, The First National Bank of Boston, National Bank of Commerce in New York, The First National Bank of St. Louis, National Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago.

Mr. J. W. DORSEY and Mr. W. E. CASHMAN, for the Defendant and for the Receiver.

BROWN & BELFORD, for the Receiver. [6]

FARRINGTON, District Judge:

The property of the Union Land & Cattle Company has been in the hands of W. T. Smith, as receiver, since July 28th, 1920. He had on hand January 1, 1924, as much land, about 6,000 less sheep and 2300 more cattle than when he took charge of the property. He started with more than $435,000 in bank; he has now $98,074.10. He had paid all expenses of operation, and more than $720,000 of the principal and interest due on secured obligations. Otherwise little or nothing has been accomplished in the way of settling the debts of the concern. For this unsettled condition the Court and the creditors, not the receiver, must be held responsible.

The order of appointment asked for and prepared by The First National Bank of San Francisco, and apparently approved by the creditors, authorized the receiver to collect all the assets of the defendant corporation, to carry on its business "according to the usual course of business of like character, and to employ such employees, accountants, agents, assistants and attorneys as he may deem necessary and proper." The reasons for such an order were thus stated in the complaint:

> "That the assets of defendant if prudently operated and administered can be realized upon over a period of time in amount sufficient to

meet all of its liabilities and leave a considerable equity for the stockholders, but that the liabilities of the defendant already matured and those now about to mature cannot be met by the defendant at the present time, or as the same fall due, and defendant cannot at this time market its livestock to advantage and by reason of the present financial condition it is impossible for the defendant to get additional credit to refund its obligations due and about to become due, and the defendant is not able and will not be able to meet its obligations as they mature in the ordinary course of business." [7]

This was a clear and confidently expressed judgment that if the estate were prudently managed as a going business under a receivership, the liabilities could be paid and a considerable equity preserved for the stockholders.

Early in 1923 there was filed an agreement to which all or practically all creditors were parties, providing that the property in the hands of the receiver be returned to the defendant company to be managed for a number of years as a going concern by a creditors' committee consisting of attorneys and bank officials, with Warren Olney, a San Francisco lawyer, as president.

This document disclosed a belief on the part of the creditors as late as April, 1923, after three years under the receivership, that the assets of the company could not be liquidated immediately and at forced sale without loss of a large part of their

value, and that the property should be liquidated over a considerable period of time, and in an orderly manner. This cannot be construed otherwise than as a deliberately formed opinion that the business of the company should be continued during liquidation.

In May, after strenuous objection had been made to a proposed distribution of about $100,000 of defendant's funds among a number of attorneys acting for the creditors, this agreement was abandoned.

No demand for immediate liquidation had been made up to this time, but within a few weeks, and on the 18th day of May, 1923, the First Federal Trust Company filed a petition praying that it be permitted to foreclose the mortgage or trust deed executed in 1916 by the defendant company to secure the payment of $1,200,000 in bonds. Every installment of principal and interest on these bonds has, and at that time had been, paid promptly. The principal then due amounted to $840,000, or thereabouts. Foreclosure was demanded on the alleged [8] ground that the appointment of a receiver constituted a violation of one of the express provisions of said trust deed. It was then stated by Mr. Olney, attorney for the Trust Company and for the plaintiff, the First National Bank of San Francisco, that foreclosure would cost from $10,000 to $25,000, and it was necessary, because, by reason of the default created by the appointment of the receiver, the trustees named in the trust deed were powerless to release from the lien of said deed any mortgaged lands the receiver might sell. This assumption,

kept constantly in the foreground, seems to have been sufficient to render fruitless any attempt on the part of the receiver to sell property covered by the trust deed. Would-be purchasers in view of the uncertainties, naturally were afraid to invest. Holding the lands and disposing of the livestock, except in limited numbers, was considered as not only unwise, but highly imprudent, for several reasons: First, it would "disrupt and disorganize the business of the Cattle Company"; second, large values would be lost if the lands were stripped of the livestock; third, under the express provisions of the trust deed, Article 3, Section 16, and Article 4, Section 1, it was provided if at any time the livestock was reduced in numbers below 25,000 cattle above one year of age, and 25,000 sheep on the lands of the company or under its control in the States of Nevada or California, that event would constitute a default entitling the trustees to take possession of the mortgaged property, and sell it on such terms as they might fix.

August 24th, 1923, the trustees named in the trust deed, on the ground that the appointment of the receiver constituted a default, filed herein a petition asking that the mortgaged property be surrendered to them to be sold at public auction on such terms as they might fix. Within a short time thereafter eight petitions were presented by the bank creditors, [9] approving the application of said trustees, and asserting that the trustees were "entitled to immediately sell said property described in said trust deed in the exercise of the powers

thereby granted." The prayer of the bank petitioners was that all the property of the Union Land & Cattle Company, except such thereof as may be sold by said Trust Company, be sold forthwith. Such a program involved forced sales of everything belonging to the defendant company under conditions highly unfavorable. More than a year and a half prior to this date, January 13th, 1922, the then president of the Trust Company and of the First National Bank, wrote the receiver as follows:

> "The committee have come to the conclusion that we might as well call the creditors' agreement off and to take immediate steps to secure control of the company's affairs or failing in that to petition the Court for an order to sell the properties.
>
> "The present management has never been in accord with the views of the creditors' committee and they feel that we should not allow it to continue in charge a day longer than necessary. The creditor banks will not finance the company unless they have control of the management either through a receiver, who is in accord with their views, or by actual purchase of the properties at foreclosure sale. I know there will be no change from this determination."

Every installment of interest and principal, amounting at the time to more than $400,000, had been paid out of funds on which the Trust Company had no lien; its security seemed ample, and the alleged default consisted in the appointment of the

receiver, made by the Court without any knowledge or warning that under the terms of the trust deed such an appointment could be followed by such serious consequences. Under the circumstances it was considered by the Court and the receiver [10] that the claim of right to sell under the trust deed "was unjust and inequitable, and that if sustained on appeal it would cause irreparable loss and injury to the unsecured creditors, the very object the receivership was invoked to prevent"; furthermore if the mortgaged property were sold at public auction by the trustees, as contemplated by the petitioners, the receiver, having no place to keep the stock, if any remained in his hands, would inevitably be forced to sell it. As a rule, at such sales prices received are small as compared with the value of the thing sold. Forced sales of all the mortgaged real property would therefore have been a calamity to every creditor not able to buy, or participate in buying, the property.

Petitions for orders directing the receiver to surrender the mortgaged property to the trustees, and to sell the remaining property forthwith, were denied, and appeals were speedily taken. The issues were of such vital importance that it was deemed expedient and necessary to employ additional counsel to assist Messrs. Brown & Belford in the presentation of the receiver's cases in the Circuit Court of Appeals. Accordingly, the receiver was directed to retain Messrs. Dorsey and Cashman. They were familiar with all the evidence and the issues involved; they were also

heartily in accord, not only with the theory that the Trust Company had waived the alleged default, notwithstanding the provisions against waiver in the trust deed, but that the receivership could not be a default within the meaning of the trust deed, if, when the receiver was appointed, the court was not informed that under the trust deed such an order of appointment would constitute a default entitling the trustees to immediate possession of all the mortgaged property, with the right to sell it on such terms as they might fix. The services performed by them were not only exceedingly valuable, but they are deserving of much larger compensation [11] than the $2500, which I here allow. To argue that their assistance was unnecessary and the employment unwise, might perhaps be regarded as depreciating the ability and legal skill of the array of eminent and confident counsel opposed to the four attorneys representing the receiver.

> Trustees etc. vs. Greenough, 105 U. S. 527; Burden Central Sugar-Refining Co. vs. Ferris Sugar-Mfg. Co., 87 Fed. 810.

Said fee of $2500, and the costs necessarily incurred by Messrs. Dorsey and Cashman in printing briefs, etc., will be paid by the receiver.

The purchase of the Lesher land does not at first view seem like liquidation, but on careful consideration it appears to me that its acquisition is not only vital, but that it will facilitate rather than delay sale of the Spanish Ranch. In itself it is well worth the money asked. It is in the moun-

tains and is covered with a large amount of feed; this, with its elevation, makes it valuable as summer range, and especially so in a dry year. Several hundred steers can be fattened thereon each season. It possesses a singular strategic value due to its location in the heart of a large and valuable range used and claimed in connection with the Spanish Ranch. An independent owner of the tract can graze sheep over the surrounding range in such manner as to take much of its use and value away from those who may be operating the Spanish Ranch. Incomplete control of the range, if a fact, will be given much weight by any one contemplating purchase of this portion of the property. The receiver was therefore ordered to complete the purchase of the Lesher land.

1 Tardy's Smith on Receivers, 253 et seq. [12]

The time has come when the property must be sold and its proceeds distributed among the creditors. By this it should not be understood that sales must be forced at that season of the year when there is no market, or a very poor one, or that the property is to be unnecessarily sacrificed in order that liquidation may be accomplished to-day rather than to-morrow. The interests of the unsecured creditors must be kept in view, and likewise the fact that the receiver is still confronted by the trust deed, and the restrictions contained therein. It is essential to the good title of a purchaser that the lands sold be released from the lien of the trust deed.

The provision that any reduction of the livestock

below 25,000 cattle over one year old, and 25,000 sheep, shall constitute a default entitling the trustee on notice to take possession of all the mortgaged lands and the livestock thereon, has not been abandoned. In open court the attorney for the trustees clearly and emphatically stated that the trustees proposed to stand on their rights under that instrument.

The proposal that only a limited amount of hay be put up; that the mortgaged lands be sold, subject to the lien of the bondholders, in one parcel, at public auction about December 1st, and that such livestock as cannot be disposed of at private sale, before some fixed date, be sold under the hammer, is not one which commends itself to the court.

The hay crop in Nevada will be unusually short this year. According to careful estimates there are 50,000 more cattle in this State than can be carried through the season on present supplies of feed, grass, hay, and hay to be cut. Similar conditions, owing to the extreme drought which prevails everywhere west of the Rocky Mountains, exist in all neighboring States. Hence large numbers of cattle must be sold and shipped out of Nevada. These conditions will tend [13] to reduce prices, and also to enhance the value of hay. Hay is already being contracted in the stack at $20 per ton. The receiver has on hand 7,000 tons of old hay, and confidently asserts that he will be able to cut not less than 18,000 additional tons.

This hay can be cut and stacked at an expense of not more than three of four dollars per ton. To refuse to cut this hay is simply to throw away values which ought to go to the creditors, and to run the risk of starving large numbers of cattle. The witnesses without exception testify that the receiver should put up all the hay possible; if not consumed, it can be sold at a large profit. Failure to cut and stack the hay crop will spell nothing but loss and disaster.

The receiver is therefore directed to put up all the hay on the lands in his possession which can, in his judgment, considering the present prices of hay and the probability of a severe winter and the shortage of feed, be profitably cut and stacked.

All witnesses have testified that the liquidation ought to proceed in an orderly manner, and that the property should be sold as a unit, or in separate units, as far as possible, in order to preserve the value inhering in the property as a going concern. They also testify that much better results can be obtained by selling the livestock and the lands together, than by selling them separately; and that private sales are to be preferred to public auction.

The receiver should at once endeavor to sell each ranch or each parcel of ranch land, with its farming equipment, livestock, spring, summer and fall range, as a unit, and as a going concern.

It is not considered that the present supply of feed including the 18,000 tons of hay which can be put up, will be sufficient to carry all of the company's livestock. The receiver must therefore pre-

pare for speedy disposal, or removal [14] to other pastures, and thereafter sell at the earliest practicable date all livestock which will bring the market price, or a reasonable one, in so far as it is, in his judgment, advisable to do so, provided that he should not, without the consent of the First Federal Trust Company, or further order of the Court, make sales which will reduce the number of livestock below the limit fixed in the trust deed. The receiver has been given abundant assurance that the Trust Company will co-operate with him in any just and equitable method of closing this receivership, and disposing of the property. There is in my opinion no necessity for further litigation with that corporation, and all occasion therefore should be studiously avoided.

It is unwise to fix any date when the properties remaining in the hands of the receiver must be sold at public auction. With a property so large and herds so numerous, the natural effect of such an order will be to check private sales and depress prices. It will be sufficient to order such sale when the necessity arises. All the testimony without exception, shows there is no demand for stock cattle at the present time, and that no one wants such cattle unless he has, or knows where he can obtain, feed and hay for them during the coming winter. Cattle are of no use as beef until properly fattened for the market. At the end of a dry season like the present, cattle cannot be expected to come off the ranges in marketable condition. They must be fed before they can be sold as beef,

and this the receiver is better prepared to do than stock raisers in general. The demand for stock cattle is in the spring, in March, April and May when there is grass on the ranges. The wool and the lamb crop come in the spring. Hence the unwisdom of forcing all this property on the market at once is apparent. That it is unwise is the judgment of every witness testifying as to how the property can be most advantageously disposed of. [15]

Much must be left to the judgment of the receiver, and he is hereby directed and authorized to proceed diligently to sell the property of the Union Land & Cattle Company in his hands in accordance with his best judgment, at current prices as far as possible, and as soon as there is a market for the whole or any portion thereof, having due regard at all times to the effect of each sale on the salability and maintenance of remaining assets. When satisfactory sales cannot otherwise be effected, be may sell the property on such terms as he may deem best for the interest of all parties, provided that he shall not sell upon a longer credit than three years from the time of sale; and in all such cases he must retain ample and unquestionable security for deferred payments.

Koontz vs. Northern Bank, 16 Wall. 196.

He is also authorized to take such measures as in his judgment may be necessary to advertise the property for sale, and to procure purchasers therefor.

The following disbursements, to wit, $7,500 to Brown & Belford and $24,000 to W. T. Smith, are

hereby allowed and approved as payments on account.

This order is not to be regarded as fixing any specific rate of compensation.

The receiver is also authorized to pay to R. M. Lesher $4,241.33 as the final payment on contract for the Lesher land; and the previous payments of $1,000, $1,000 and $4,241.30 in the same transaction are confirmed and approved. [16]

[Endorsed]: No. B–11. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land & Cattle Company, a Corporation, Defendant. Opinion. Filed August 4th, 1924. E. O. Patterson, Clerk. [17]

In the District Court of the United States in and for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant.

ORDER AUTHORIZING RECEIVER TO MAKE FINAL PAYMENT ON LESHER PROPERTY.

This matter coming on to be heard this 19th day of June, 1924, upon the petition of W. T. Smith, Receiver of Union Land and Cattle Company, for instructions and directions as to the liquidation of the property and assets of said Union Land and Cattle Company in his possession as such receiver, and it appearing to the Court that due notice of said petition had been published and served upon the parties to the above-entitled suit and upon all creditors of said Union Land and Cattle Company, and that said petition had been duly served upon the parties to said suit, and the said receiver appearing by Brown & Belford, J. W. Dorsey and W. E. Cashman, his attorneys, the said Union Land and Cattle Company appearing by J. W. Dorsey and W. E. Cashman, its attorneys, First Federal Trust Company appearing by Jones & Dall, its attorneys, the following creditors: W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maude B. Clemmons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey appearing by J. W. Dorsey and W. E. Cashman, their attorneys, Silveria Garat, a creditor, appearing by Fred L. Dreher, her attorney; the following creditors: Old Colony Trust Company, The First National Bank of Boston, [18] National Bank of Commerce in New York, the First National Bank in St. Louis, National

Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago, appearing by McCutchen, Olney, Mannon & Greene, their attorneys; and it further appearing to the court that said Old Colony Trust Company, The First National Bank of Boston, National Bank of Commerce in New York, The First National Bank in St. Louis, National Shawmut Bank of Boston, National City Bank, and First National Bank of Chicago, had filed an answer and cross-petition to the petition of said receiver, and that said Union Land and Cattle Company and W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maude B. Clemmons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey and said receiver, W. T. Smith, had filed an answer to said cross-petition of said banks in opposition to the relief prayed for in said answer and cross-petition of said banks and said petition of said receiver, W. T. Smith, being called for hearing by said court on said day, and having been heard upon the pleadings filed in said proceeding and upon the evidence offered by said receiver and by said individual creditors and said Union Land and Cattle Company, and upon the testimony of the witnesses for said parties, and the matter having been duly submitted to the Court on the 20th day of June, 1924, and the Court now being fully advised in the premises;

IT IS ORDERED that W. T. Smith, receiver of the Union Land and Cattle Company, shall proceed forthwith and as speedily as may be to sell

and dispose of the property and assets of said Union Land and Cattle Company; that such sales shall be made in accordance with his best judgment and for the best terms obtainable by him; that he is hereby authorized and directed to negotiate for such sales with such purchasers as he may be able [19] to procure, and to make and execute contracts for such sales with such purchasers, and to deliver to such purchasers any and all property purchased by them pursuant to such sales and contracts.

IT IS FURTHER ORDERED that the said W. T. Smith, as such receiver, shall be and he hereby is authorized to take such measures as in his judgment may be necessary to facilitate the sale and disposition of such property, and to cause advertisements to be published of such sales wherever deemed necessary by him.

The said W. T. Smith, as such receiver, is further directed to take such measures as may be necessary to secure the payment to him as receiver of all accounts that may be due to said Union Land and Cattle Company from the Antelope Valley Land & Cattle Company, a corporation of the State of California, and further to collect for said Union Land and Cattle Company any indebtedness that may be due to it from any other person, company or corporation.

The said W. T. Smith, as receiver, in the sale and disposition of such property and assets, is advised to proceed with such liquidation so as to sell whenever it shall be practicable, land and live-

stock together rather than separately, as going concerns, and in such units, divisions, subdivisions or parcels as may be desired by purchasers; and further, if sales may be made in this manner, the said W. T. Smith, as receiver, is hereby expressly authorized to take such measures as may be necessary to constitute or form from the property of said Union Land and Cattle Company such units, divisions, subdivisions or parcels as may be agreed upon between the said W. T. Smith and any purchaser or purchasers.

In the sale, liquidation and disposition of said property [20] and assets, the said W. T. Smith, as such receiver, is expressly directed not to commit any act which may constitute an event of default as defined in that certain deed of trust executed by the Union Land and Cattle Company to said First Federal Trust Company and Milton R. Clark, as trustees, on September 1, 1916, and that until the further order of the court, such liquidation shall proceed subject to the provisions of said deed of trust; that is to say, the receiver shall not sell, without the consent of the trustees named in said deed of trust, cattle or sheep in numbers that will reduce the number of cattle upon said lands to less than 25,000 not less than one year old, or the number of sheep upon said lands to less than 25,000. When during the liquidation of the property and assets of said Union Land and Cattle Company, the receiver shall have sold all cattle, except 25,000 head not less than one year old, and all sheep except 25,000 head, he shall immediately report such fact

to this court, and apply for further instructions concerning the subsequent liquidation of such property and assets.

The said W. T. Smith, as such receiver, is further ordered and directed, in case sales of real property are made, to negotiate with said First Federal Trust Company and Milton R. Clark, trustees, for any release or releases which it may be necessary to secure in order to effect sales of any real or other property which is subject to the lien of that certain deed of trust hereinabove referred to. This order also applies to the sale of the capital stock of the Antelope Valley Land & Cattle Company covered by said trust deed.

The said W. T. Smith, as such receiver, is further ordered and directed to harvest, cut and stack such hay as may be produced from the lands in his possession, and to use the same in feeding and properly providing for the livestock during such liquidation. If it shall be found that there is a deficiency [21] of such hay to properly care for such livestock until the liquidation thereof shall be completed, then the said W. T. Smith is directed to apply for instructions to this court with regard to all purchases of additional hay; and the said W. T. Smith is hereby authorized and directed to sell any surplus of such hay that may remain subsequent to the time of such sales of such livestock for the best terms obtainable therefor.

The said W. T. Smith, as such receiver, is hereby ordered and directed to proceed, without unnecessary delay, in the sale and liquidation of the prop-

erty and assets of the McKissick Cattle Company, a corporation of the State of Nevada, subject to the provisions of any mortgage existing upon any of its property, and such receiver is advised in such liquidation to endeavor: (1) To sell and dispose of all the capital stock of said company, if purchasers can be found therefor; (2) To sell the property of said company as a going concern, land and livestock together and as a unit; (3) To sell and dispose of said property, land and livestock together, in such subdivisions as may be desired; (4) To sell and dispose of land or livestock as the same may be salable to any purchaser. The directions and advice hereinabove given shall not be deemed or construed by the said receiver to authorize any departure by him from the terms of the option, to purchase heretofore executed to Mr. R. Keiffer, and now outstanding.

The said W. T. Smith, as such receiver, in the sale of beef cattle, is hereby directed and ordered to proceed with such sales as rapidly as such cattle can be prepared for market and in as large lots as are possible to be prepared. While such sales may be made by him in accordance with his best judgment, current market prices for the numbers of said cattle which may be offered to the market, should when practicable be obtained. [22] The same advice is given to the receiver in the sale of sheep so far as in his judgment it may be practicable.

The receiver is further expressly authorized to sell and dispose of any or all of the property of said Union Land and Cattle Company by public sale

or by public auction whenever in his judgment such sales by such methods are practicable to be made, and whenever in his judgment such sales, the element of time being considered, will or may result in better prices than may be obtained by private sales or by sales by other methods.

The said W. T. Smith, as such receiver, is hereby authorized and directed to sell and dispose of the personal property and equipment on the various ranches and properties of said Union Land and Cattle Company in any manner deemed best by him as rapidly as such personal property and equipment may reasonably be dispensed with in the operation of such properties or ranches.

The following disbursements: $7,500 to Brown & Belford and $24,000 to W. T. Smith, are hereby allowed and approved as payments on account. This order is not to be regarded as fixing any specific rate of compensation.

The receiver is also authorized to pay to R. M. Lesher $4,241.33, as the final payment on contract for the Lesher Land; and the previous payments of $1,000, $1,000 and $4,241.30 in the same transaction are confirmed and approved. He is also directed to pay to J. W. Dorsey and W. E. Cashman $2,500, for services heretofore rendered the receiver in the Circuit Court of Appeals.

E. S. FARRINGTON,
District Judge. [23]

[Endorsed]: No. B–11. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco,

a Corporation, Complainant, vs. Union Land & Cattle Company, a Corporation, Defendant. Order. Filed August 4th, 1924. E. O. Patterson, Clerk. [24]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

STATEMENT OF EVIDENCE.

The petition of W. T. Smith, the receiver of the above-named defendant Union Land and Cattle Company, filed in the above-entitled cause on May 26, 1924, for an order authorizing said W. T. Smith, as receiver as aforesaid, to pay R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 (4,241.33) Dollars as a final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher, and confirming and approving previous payments of One Thousand (1,000) Dollars, One Thousand (1,000) Dollars and Four Thousand Two Hundred Forty-one and 30/100 (4,241.30) Dollars on account of said contract, came on regularly for hearing before the Honorable E. S. Farrington, Judge of the above-entitled court, on Wednesday, the 18th day of [25] June, 1924, upon the issues raised by the said petition and the objections thereto by the above-named interveners. Upon said hearing Messrs. George S. Brown and Samuel W. Belford and Messrs. J. W. Dorsey and W. E. Cashman appeared for said receiver; and Messrs. J. W. Dorsey and W. E. Cashman appeared for said defendant Union Land and Cattle Company and for W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey; and Fred L. Dreher, Esq., appeared for Silveria Garat, unsecured creditors of said defendant Union Land and Cattle Company; and

Messrs. McCutchen, Olney, Mannon & Greene by A. Crawford Greene, Esq., and John F. Cassell, Esq., and Messrs. Hoyt, Norcross, Thatcher & Woodburn, Esq., appeared as counsel for the above-named interveners.

Thereupon the following proceedings were had and the following testimony and evidence was presented:

Mr. BELFORD.—If the Court please, this is the time fixed for the hearing in the matter of the receivership of the Union Land and Cattle Company, for an order approving certain payments made by the receiver, and asking authority to make certain other payments, in accordance with the petition. The payments, approval of which is asked, consist of the sum of $4,241.33 to R. M. Lesher. The petition also requests authority of the court to authorize the payment by the receiver of the further sum of $4,241.33 to R. M. Lesher. (It was admitted by all parties that due notice of the hearing had been given.)

Now, in order that we might possibly save a little time, I would like to ask counsel whether the objection goes to all of these items, or whether there are any items to which no objection is taken?

Mr. GREENE.—We would like to have the proof made, Mr. [26] Belford.

Mr. BELFORD.—As to all of them?

Mr. GREENE.—As to all of them.

Mr. BELFORD.—Mr. Smith, will you take the stand?

The COURT.—Does anyone appear for the Trust Company?

Mr. JONES.—If your Honor please, I appear for The First Federal Trust Company; but so far as I know, in these present hearings for to-day, we are not interested. We haven't been directly served with any petitions, and I know of nothing that interests us directly at the hearing to-day. To-morrow we may appear.

Mr. BROWN.—As solicitors for The First Federal Trust Company?

Mr. JONES.—The First Federal Trust Company.

The COURT.—Then The First Federal Trust Company and the First National Bank of San Francisco, the plaintiff, are not interested in this proceeding to-day?

Mr. JONES.—Well, I do not speak for The First National Bank, because I do not represent it. I am here for The First Federal Trust Company to see what goes on, and if there is anything that affects us, we will ask permission to be heard; but so far as I am informed, there is nothing in these petitions which directly or indirectly affect The First Trust Company to-day.

TESTIMONY OF W. T. SMITH, FOR RECEIVER.

Mr. W. T. SMITH, called as a witness, after being duly sworn, testified as follows:

The WITNESS.—(On Direct Examination by Mr. BELFORD.) I am the receiver of the Union

(Testimony of W. T. Smith.)

Land and Cattle Company and have been since July 28, 1920. During that time I have conducted [27] the affairs of the Union Land and Cattle Company as receiver. I have caused to be prepared a statement of the receipts and disbursements of the Union Land and Cattle Company under my management as receiver. The statement which you hand me is the one to which I refer and it is correct. This was prepared by Mr. Frasier at my request. The receipts in 1920, for five months, were $1,224,126.19. In 1921, $981,858.02. In 1922, $1,052,485.65. In 1923, $1,145,363.69. For the first five months of 1924, $466,964.58. Total, $4,870,798.13. The disbursements for the last five months of 1920 were $977,865.46. For 1921, $1,495,315.18. For 1922, $1,252,937.90. For 1923, $1,111,482.91. For the first five months of 1924, $389,190.34. Total, $5,226,791.79. We received at the beginning of the receivership $454,067.76; and we had on hand on the first of June, $98,074.10. There were some transactions during this period of purchase and redemption of Government certificates, in which we invested our surplus cash, and I don't know whether those figures are included in these or not, but I think they are not. The property of the Union Land and Cattle Company, in a general way, consists of land and cattle and sheep—land and livestock. My remembrance is that the total land under the control of the receivership, including the Antelope, is 352,000 acres, about. There are approximately 40,000 head of cattle and 36,000 sheep, not counting lambs, and in

(Testimony of W. T. Smith.)

addition to that there is other livestock, like horses and so forth. I think there are about 2,600 horses. There has been practically no change in the condition I have described as to the extent of the holdings of the Union Land and Cattle Company, practically during the entire receivership. It is a very large estate, consisting of the acreage and livestock which I have described. It is divided into divisions. They are known as the Deeth Division, the Spanish Ranch Division, [28] which owns land in Elko County and in Humboldt County; what is known as the Lovelock property, which is a part of the Deeth Division, but is in Lovelock, it is hay land, about 960 acres; and then about 16,000 acres in the northern part of Washoe County, which we call the H. C. Division. And then there is about 16,000 acres in Lassen, and I don't know whether any of it is in Modoc County or not, which is known as the McKissick Division. And there is about 33,000 acres in Sacramento and Amador Counties, in California, which is also a part of the McKissick Division. And then there is approximately 80,000 acres in Mono, Douglas and Lyon Counties, Nevada, which is known as the Antelope Division. Then we have some small holdings down near Fallon, a small hay ranch; I think it is a part of the Union Land property, I am not sure about that, though, which division it belongs to; we cut a little hay down there, it is near the desert. And then we own, the McKissick Division owns an interest in some land in Lassen County, that has been carried on under the

(Testimony of W. T. Smith.)

name of John T. Long; it is a mixed up affair of John Long and the estate which I think is called the Hall Estate; we own some of the land in full, and some of it we own one-half of, and some a quarter or a third; it is a mixed up arrangement. And then the McKissick Company owns an interest in what is known as the Mapes Ranch, about 1,400 acres, which is on the east side of Honey Lake. As near as I remember that comprises our holdings.

Thereupon, two maps showing the property covered by the Lesher contract were offered and admitted in evidence as Exhibits "A" and "B" respectively for identification, and these maps are sent up with this statement by stipulation.

Mr. BELFORD.—(Q.) Mr. Smith, I hand you Exhibits "A" and "B" for identification, and I wish you would explain to the Court just what they are, referring now to Exhibit "A" for identification. [29]

(A.) This map described as Exhibit "A" is a map of the holdings of the Union Land and Cattle Company known as the Spanish Ranch Division, not including what is known as the Godchaux property, which is in Humboldt County. This is the main Spanish Ranch Division.

(Q.) You are referring to Township 41 North, Range 52 East; Township 40 North, Range 52 East; Township 39 North, Range 42 East—Townships 39, 40, 41, 42, 43 and 44?

(A.) That is the main holding of the Spanish

(Testimony of W. T. Smith.)

Ranch Division, and where the headquarters are situated. This line of forties is the bed of the Owyhee River (indicating on map).

(Q.) The line of forties running from Township 41 North, Range 52 East, to Township 42 North, Range 49 East, in a general northwesterly direction.

(A.) It is what we know as the I. L. Ranch, westerly from the I. L. Ranch.

(Q.) And Township 41 North, Range 48 East?

(A.) Is what we know as the Winters Ranch.

(Q.) It is parts of sections 8, 9, 17 and 16, in Township 41 North, Range 49 East.

(A.) This map shows, on "B."

(Q.) Referring to map "B," where does the land in there appear on Exhibit "B?"

(A.) Right here (indicating on map).

(Q.) In what color?

(A.) In yellow —, 16 and 17.

(Q.) Well, it appears in yellow on this Exhibit "B."

(A.) Yes. Township 41, Range 49.

(Q.) How many acres there? (A.) 1280.

The WITNESS.—(Continuing.) And we also have in addition the [30] land in blue that has been taken up in connection with this as an enlarged homestead. A man named De Witt took up the land appearing on this exhibit in blue and we have fenced this land in connection with this other. The necessary procedure has not been gone through with yet to enable us to get a deed for that. This

(Testimony of W. T. Smith.)

Lesher matter was brought to my attention by Mr. Calligan soon after I became receiver of the Union Land and Cattle Company. Mr. Lesher and his brother were two old miners and they owned or had located some mining claims in section known as Good Hope. It is on the north side of Tuscarora Mountain in the middle of our range that I have described as the I. L. and the Winters property. This land is located right in the middle of our range. Mr. Lesher is an old man and Mr. Calligan brought this matter to my attention in the beginning stating that Mr. Lesher wanted to sell the property. He stated that Mr. John G. Taylor had been—Mr. John G. Taylor is a stockman, cattle and sheep man, ranging his cattle and sheep in our country and he has large holdings. Mr. Lesher wanted $15,000 for the property; I wasn't familiar with it, so I discussed the matter with Mr. F. W. Holbert. Mr. Holbert has been and was employed by the Union Land and Cattle Company. Mr. Holbert told me the circumstances of the Lesher matter and explained that he had been in consultation with Mr. Lesher with the object of buying the property for the Union Land and Cattle Company, but that Mr. Lesher wanted too much money. I think in our files there are some letters to and from Mr. Holbert and Mr. Lesher, Mr. Calligan and Mr. Lesher, and I think Mr. Moffat also. Mr. Moffat was superintendent of the Union Land and Cattle Company at that time and president of the company. I thought it was important for the Union

(Testimony of W. T. Smith.)

Land and Cattle Company, or the Spanish Ranch Division, to purchase this land from Mr. Lesher, if it could be done at a reasonable price; [31] a holding like this in the heart of our range would be very injurious to the Union Land and Cattle Company, and would permit Mr. Taylor, if he should buy it, or anyone else, to get a holding there that would in a way give them access for their cattle and sheep to the heart of this range, which was really the only valuable range by itself that we had left. I went out there on two occasions and climbed this mountain on purpose to see this property; I talked with Mr. Lesher, and we were unable to come to any agreement; I thought $15,000 was too much. I discussed the matter with everybody that was interested; I have gone through our files; I thought I had letters that I had written to Mr. E. E. Brown about it; but I am unable to find any correspondence so the thing must have been personal conversation; but nothing came of it. We discussed the matter here with the Court, with Judge Farrington several times, and while everybody agreed we did not want to buy any land, we had all the holdings we wanted, yet we felt that it was vitally important that we should acquire possession of this in some way to prevent anyone else from getting in there. The purpose was to protect our own range for our own cattle and sheep. It ran along until some time in 1923, and Mr. Calligan wrote, and I think he told me that he thought the property could be bought for less money, that Mr.

(Testimony of W. T. Smith.)

Lesher wasn't well, and his sisters wanted him to give it up and go away. One day Mr. Calligan sent to the office a contract that he had personally made with Mr. Lesher, buying the property for $10,000; $1,000 at the time of making the contract; $1,000 to be paid some few months afterwards; $4,000 to be paid on the 21st of June, 1923; and $4,000 to be paid on the 21st of June, 1924. Mr. Calligan stated in this that he had bought it in his own name, but that he had bought it for the Union Land and Cattle Company, and the Union Land and Cattle Company should have the property when it had [32] paid the amount, and he would deed over his right to it. Last year, some time in June before this payment matured, I made an appointment with Mr. Calligan to meet me at Winnemucca, and go to Elko and make this transfer; Mr. Calligan failed to meet me in Elko, and I was unable to reach him by any means that I had at my command; when the payment matured I paid the $4,000 to the bank at Elko, with interest, and had Mr. Griswold in Elko transfer Mr. Calligan's title to me for the Union Land and Cattle Company, but didn't put it in the name of the Union Land and Cattle Company, because we didn't wish to involve it in the mortgage held by the First Federal Trust Company. Before the payment was made I consulted with Judge Farrington; and while he maintained the same opinion we all had, that we didn't want land, he finally said to me, "I am not familiar with this except as you tell me, I will have to trust to

(Testimony of W. T. Smith.)

you to use your own judgment," so I completed the transaction. My judgment was that it was necessary to hold that land as a protection to the range of the Spanish ranch and if it were secured by John G. Taylor or any other large livestock owner, likely to range his own cattle or sheep on this land or to get access to this tract of land, it would seriously impair the value of our range and our livestock. It was a defensive measure. I happen to refer to John G. Taylor because his name happened to be mentioned in connection with it. He had more land and he had more sheep and cattle; we had no more fear of John G. Taylor acquiring the holdings than we did of any other particular individual. We had no quarrel with Mr. Taylor; it was that the land should not go into the possession of any one else who owned sheep or cattle. That is the most valuable range land in one body that belongs to the Spanish Ranch Division, and to have some other stock man acquire that holding in there would be very detrimental to the interests of the [33] Spanish Ranch Division. Last year we ran about 8,000 ewes, the ewes were wintered on the Ione Ranch, and taken to Elko in the spring time, and they ranged over this country that is described on this map, and on the top of this mountain adjacent to the Lesher land next to the range of what used to be the Golconda Land and Cattle Company, now it is changed to the Ellison. We paid $1,000 to Mr. Calligan and he paid it to Mr. Lesher for the rent of the property

(Testimony of W. T. Smith.)

for the year 1922. For 1923 the same amount of money was paid for rent. For 1924 no rent has been paid, or no amount has been charged in the books for any purpose on account of that. We paid $4,000 on the purchase price last June.

There was thereupon offered in evidence and admitted as Receiver's Exhibit "C" the following contract:

RECEIVER'S EXHIBIT "C."

"MEMORANDUM OF AGREEMENT, Made and entered into this 23d day of June, 1922, by and between ROBERT M. LESHER, of Elko County, State of Nevada, party of the first part, and GEORGE H. CALLIGAN, of the same place, party of the second part:

WITNESSETH:

That said party of the first part, for *an* in consideration of the sum of One Dollar in hand paid by said party of the second part, receipt whereof being hereby acknowledged, hereby covenants and agrees with said party of the second part to sell, transfer, convey and forever set over unto said party of the second part those certain premises known as and called the Bob Lesher Ranch, situate in the County of Elko, State of Nevada, and said party of the second part hereby agrees to buy those certain premises, and particularly described as follows:

IN TOWNSHIP 41 NORTH, RANGE 49 EAST, M. D. B. & M.

SECTION: 8: SE¼ SE¼
SECTION: 9: S½ SW
SECTION: 16: NW¼, E½ SW¼, SW¼ SW¼;
SECTION: 17: E½, E½ SW¼, SE¼ NW¼;
SECTION: 20: NE¼, N½ SE¼, E½ NW¼, NE¼ SW¼
SECTION: 21: S½ NW¼ [34]

Save and except the buildings and mining rights thereon. For the sum of TEN THOUSAND DOLLARS, payable as follows:

$1,000.00 on the signing of this instrument, receipt whereof being hereby acknowledged; $1,000.00 to be paid on or before December 1, 1922; $4,000.00 to be paid on or before June 21, 1923; $4,000.00 on or before June 21, 1924; all deferred payments to bear interest at the rate of 6% per annum from date until paid.

It is understood and agreed by and between the parties hereto that said party of the second part shall have immediate possession of said premises, together with all livestock, as shown in that certain bill of sale bearing even date herewith and delivered in connection therewith, it being expressly understood and agreed that said party of the second part shall pay for said cattle immediately upon receipt of said Bill of Sale at the rate of $35.00 a head for all grown stock, calves thrown in and that the correct count of said cattle to be delivered shall be fifty-one head; that said horses shall be included

in the purchase price of said ranch, to wit, $10,000.00.

It is further covenanted and agreed by and between the parties hereto that said party of the second part shall pay all taxes, of every name, nature, kind and description which may be levied upon and become due upon said premises herein agreed to be sold; that the installment of taxes due in December, 1922, shall be paid by said party of the second part; provided, however, that if said party of the second part does not pay said taxes, then said party of the first part may pay the same but that it shall be repaid by said party of the second part, together with interest thereon at the rate of 6% per annum from the date of payment of said taxes by said party of the first part until the date of repayment by said party of the second part to said party of the first part, before [35] the deed held in escrow by virtue of this agreement shall be tendered to said party of the second part.

It is further understood and agreed by and between the parties hereto that said party of the second part shall keep said premises in good repair, and shall do each, every and all things necessary for the protection of the water right thereon, and shall keep the ditches on said premises in good repair during the time this agreement remains in force and effect; and shall farm said premises in a good and farmerlike manner, without waste; and said party of the second part shall keep all fences on said premises in good repair; provided, however, said party of the second part need not

cut hay from said premises, but may pasture same, at his option.

It is further covenanted and agreed by and between the parties hereto that said party of the first part shall not interfere with said party of the second part using said premises, but shall confine his operations to mining, and shall not molest said party of the second part in the handling of cattle on said premises during the time this contract remains in force and effect.

It is further covenanted and agreed by and between the parties hereto that said party of the second part shall not be responsible for the repair and upkeep of said premises which have been reserved in said deed by said party of the first part.

It is further covenanted and agreed that said party of the first part shall upon the execution of this agreement make, execute and place in escrow in the Henderson Banking Company's bank, at Elko, Nevada, a good and sufficient deed, conveying and assuring good and sufficient title to the within described premises to said party of the second part, and to his heirs and assigns forever, with instructions to said Henderson Banking Company to hold said deed in escrow, [36] said deed to be delivered to said party of the second part, or his legal representative, when he or they have paid or caused to be paid to said party of the first part, or his legal representatives, the full sum of $10,000, together with all interest due thereon, and all taxes that have been assessed against said premises, as hereinbefore specified, said deed to be delivered to

said party of the second part upon final payment of said purchase price and in accordance with the terms of this contract.

It is further understood and agreed that in the event of forfeitures hereinbefore agreed upon are made, or if any of them be made, that the deed directed to be held in escrow by said Henderson Banking Company, under and by virtue of this agreement shall be returned and delivered to said party of the first part, or his legal representatives, on his option, upon demand being made therefor, and said party of the first part may declare all sums due and payable and proceed in the collection thereof forthwith, it being expressly understood and agreed that said Henderson Banking Company shall incur no liability, either in law or in equity, by reason of said delivery or return.

It is further understood and agreed by and between the parties hereto that the failure of said party of the first part to exercise option which may accrue under this agreement, or to declare this agreement of no further force or effect and that all payments that shall have been made by said party of the second part under the terms of this agreement forfeited, shall not prevent said party of the first part from exercising such option or declaring such forfeiture on the part of said party of the second part.

This agreement to be binding upon and to inure to the benefit of the heirs and assigns of the parties hereto.

It is further understood and agreed that said

(Testimony of W. T. Smith.)

party of the [37] first part warrants the title to said premises to said party of the second part, his heirs and assigns, forever.

Time is the essence of this agreement.

IN WITNESS WHEREOF The parties hereto have hereunto set their names, the day and year in this instrumnt first written.

ROBERT M. LESHER."

The WITNESS.—(Continuing.) The payments which were made to Mr. Lesher for rent applied on the purchase price. Two of the payments have been in the accounts and have been allowed by the Court as rent. I regard the fulfillment of that contract as a necessary thing for the estate. I concur in the opinion of Mr. Moffat and Mr. Petrie that this contract should be completed. This payment has to be made on the 21st of June, that is the 21st of this month. The accounts show that $1,000 was paid on June 25, 1922, and $1000 on December 1, 1922. That was not the $4,000 payment—the $4,000 payment was made later, the $4,000 payment was made in June, I think it is June 22, 1923.

The WITNESS. — (Continuing Under Cross-examination by Mr. GREENE.) The impression is that the Ione Ranch has been the most profitable of the divisions of the Union. I think that the Deeth property would come next to that. As an operating proposition, the Antelope would come next. I think the H. C. is the last one of the lot, but the Spanish Ranch Division would be pretty close; in the same category. We have operated

(Testimony of W. T. Smith.)

the Spanish Ranch for pretty nearly four years and it has never paid its way. There has not been a loss every year—it seems to me the books show a profit one year, I am not sure about that. At the best not for more than one year out of the four—I do not think to amount to anything. As to whether or not I think it would be sound judgment for the receivership, which is to be terminated within what the Court of Appeals has called a [38] reasonable time, to put an additional fund of $10,000 into the purchase of this nonprofitable property, I think it would, but only for the reasons I have stated here. There are 1280 acres of flat measurement, but some tell us that there would be 1800 acres land measurement, because the country is very steep, hilly and mountainous. It is 1280 acres as we buy it, but the actual land measurement would be greater, of course. I cannot answer as to how much the Spanish Ranch is worth, acre by acre. I cannot tell whether I could sell it for $3.00 an acre, I doubt it now. As to whether or not I recommend the purchase on the basis of seven or eight dollars per acre of this twelve to eighteen hundred acres, I do not recommend it that way. The purchase of this Lesher land was for the reason I have stated—to keep someone else from getting into the heart of our range and destroying that range. From the time I have been familiar with the property as receiver up to the present time, I have had no difficulty whatever on account of that Lesher property from

(Testimony of W. T. Smith.)

trespassers or otherwise. Mr. Lesher did nothing to it, there was no damage; I think we rented the place from him one year before Mr. Calligan bought it. I think the vouchers for the payments to which I refer as the $1,000 payments of June 25th and December 1st, 1922, must be in the office. The contract purports to be a contract between Mr. Lesher and Mr. Calligan. The writing under which the contract was assumed by me is in Elko. It was made by Mr. Griswold and signed by Mr. Calligan and it is in the Henderson Banking Company, in the office with Lesher's deed, which is in escrow. I have not the paper but can secure it for you and will do so. I have done nothing up to the present time with reference to turning the contract over to the Union Land and Cattle Company, together with the rights under the contract. It is in my name now. I have at all times held the legal [39] title or held whatever rights flow from the contract and have not turned them over to the Union. The reason why the usual procedure wasn't followed by filing a petition and having a hearing, advising the creditors of the proposals when the $4,000, plus interest, was paid on account of the contract, was as I told you. I talked to Judge Farrington himself in his chambers and he told me he wasn't familiar with the land and that I would have to use my best judgment; so I went up there to get Mr. Calligan and Mr. Calligan wasn't in condition to see me or do business and I couldn't meet him and the contract matured and unless it

(Testimony of W. T. Smith.)

was paid on the date it was due, what had been paid already would have been forfeited and Mr. Lesher would have still owned the property. Afterwards, Mr. Calligan went to Elko and conveyed the property, his right, to me. I took it in my name, as I told you, to keep it from being complicated with the mortgage in San Francisco. In other similar transactions involving purchases, certainly in the channels of capital expenditure, I have made it a customary procedure to file petitions and to advise the creditors and to have a hearing with reference to such purchase. These accounts, as fast as they came, were put into Court in the usual way and the judge did not pass upon them until the time when you know, when the objections were made. They were six months behind, were not passed upon.

WITNESS.—(Continuing Under Redirect Examination by Mr. BELFORD.) If the Lesher property had been purchased then, upon the assumption it had fallen into the hands of some one like Mr. Taylor or any other large livestock owner who had utilized the range, the operations of the Spanish Ranch might have been more unprofitable than they were. The payment of the $6,000 was made before the policy of liquidation became impending, namely, before the creditors' meeting of 1923. The acreage basis, with reference to the purchase of [40] the Lesher property, was secondary to the purchase of the property on account of the peculiar position it occupies with reference to the range. It

(Testimony of W. T. Smith.)

was the position basis which afforded the primary consideration and inducement for its purchase, rather than its acreage. It was a mere protective measure for the whole Spanish Division range. With regard to the taking over in my name of the contract that had been made, that was simply holding it as a trustee for the Union Land and Cattle Company, due to the fact of the existence of the trust deed covering real property. Somebody connected with the management, creditors or some one, suggested that that be the procedure; I don't know who did it or how it came about, but it was suggested by somebody. The benefits to be derived from that purchase were the benefits to be derived by the estate of the Union Land and Cattle Company and not by me personally in any sense of the word. Mr. Cassell asked the question at one of the hearings here a while ago if it was bought for the Union Land and Cattle Company and I replied it was.

The $4,000 payment which I ask to have approved now was made in June, 1923. I think it was June 21, 1923.

(Q.) Now, you have suggested that the operation of the Spanish Ranch property, while unprofitable, would have perhaps been even [41] more unprofitable, had you not outstanding this purchase contract for the Lesher property; to what extent would the receipts from operation of the Spanish Ranch property been reduced had this contract not been in existence?

(A.) Can I answer the question in my own way?

(Testimony of W. T. Smith.)

(Q.) I think that is the best way, Mr. Smith.

(A.) Well, I refer to Mr. Taylor, because he happens to be the man we have mentioned; he runs on our ranges, not on our ranges but on that range up there, Spanish Ranch, from 2,500 to 4,000 head of cattle; those cattle are wintered some place down near his ranch at Lovelock; I don't know where, down there somewhere; in the spring time they bring those cattle back, they bring them in at the Winters place we have talked about here, and they turn them loose on that range there. Now, it has been our custom in the spring, when we bring our cattle back, to put them on the desert which adjoins the Winters Ranch; Mr. Taylor's cattle in case he had that home place, or whatever you want to call it, consisting of the Lesher place, would remain on that Good Hope range, and destroy the value to that extent of that range, from what we would get if he wasn't in there. That is what I mean.

(Q.) And to what would that extent go?

(A.) That I could not tell. We probably run as many cattle as he does, maybe twice as many; I don't know how many we put in there.

TESTIMONY OF H. PETRIE, FOR RECEIVER.

Mr. H. PETRIE, a witness called by receiver, after being duly sworn, testified as follows:

The WITNESS.—(Under Direct Examination by Mr. BELFORD.) I am manager of the prop-

(Testimony of H. Petrie.)

erties of the Union Land and Cattle Company under the receiver and have been for about two years and eight or nine [42] months. I am familiar with the properties of the Company and particularly the Spanish Ranch. I know where the Lesher property is and I know the circumstances of its purchase in a general way. I think the purchase was quite essential at the time and the price paid was very reasonable for the grass and the security obtained. There is no question about it in my mind that the purchase of the land was advisable to preserve the range of the Spanish Ranch Division. I absolutely think it should have been made and I think that the price paid was reasonable. In the first place, this has a considerable body of good grass land, and the high altitude where the grass remains green in ordinary years until late in the season; it protects a good many cattle, perhaps three or four hundred steers, during the time of year that you are getting them in shape to prepare them for shipment to market; steers can be thrown in there and held while the range is being worked in that locality, be held there and gain all the time. I think it is worth the money from that standpoint alone; however, eliminating that fact entirely, it was worth the purchase price for protection to the rest of the range. In explaining that, we will assume any stockman having both sheep and cattle, or either sheep or cattle, located in that locality, would get a foothold, and headquarters on this particular 1,280 acres, he could use the

adjoining range for a great many head of live-stock that are now under our control on account of having this property; and in addition to that, it would help close up the gap from the west, that is, the entrance from the west into the main range on Tuscarora Mountain, and those mountains surrounding Tuscarora, from any tramp bands of sheep, and so forth, encroaching, not only on this land but on land for several miles through there; it would be a great protection in that particular, because there are two miles of fence that practically closed out [43] bands from the west. It would also help to head out a great many range horses and wild horses that assemble throughout that country, that eat a great deal of feed that the Cattle Company has on this range. That would be particularly bad at this time in a season of shortage of feed, but it is very valuable at any time no matter what the season.

The WITNESS. — (Continuing Under Cross-examination by Mr. GREENE.) I have an idea if a fellow would do a little trading he might sell the land covered by the Lesher contract for $10,000; he might even beat that price a little. I do not know whether it would be possible for the receiver, if somebody advised, to turn around and dispose of it for the amount that he paid, but I feel quite sure that is the case. If I were the owner of the Spanish Ranch, without that property, the Lesher property included within it, and were in a position where I had to sell it between two and four months

(Testimony of H. Petrie.)

from to-day, I would recommend, as a matter of business operating policy, purchasing the Lesher property at $10,000. I would like to bring that in my statement before; I overlooked it. The property has more than $10,000 value. I meant to bring that in; I think it adds more than the purchase price to the whole value of the property.

TESTIMONY OF W. H. MOFFAT, FOR RECEIVER.

Mr. W. H. MOFFAT, a witness called by receiver, after being duly sworn, testified as follows:

The WITNESS.—(Under Direct Examination by Mr. BELFORD.) I am president of the Union Land and Cattle Company and am familiar with the properties of the company; I am familiar with the location of what we have been discussing here to-day as the Lesher property which is now a part of the Spanish Division. I know the circumstances of its purchase. I think the purchase was advisable and [44] was a benefit to the Spanish Division. In this respect, because it is the key to that particular part of the range, I think it advisable as a protective measure and that it does, on account of its location, protect the range of the Spanish Division without a doubt. I suppose it ought to be worth the same now as then. I think it could be sold. I think if the Company wants to dispose of it, I could find a party who would buy it at what it cost the company.

(Testimony of W. H. Moffat.)

It was made to appear that included in certain accounts of the receiver which were presented for settlement on January 12, 1924, were certain items of disbursements by the receiver for payments on account of said contract; that at said hearing on January 12, 1924, interveners excepted to the allowance of said items and on May 26, 1924, on the hearing of certain subsequent accounts, the Court sustained the exceptions taken by the interveners on January 12, 1924, above referred to.

The aforesaid exceptions taken by the interveners on January 12, 1924, and sustained by the Court as aforesaid were thereupon offered and admitted in evidence and were read into the record from pages 29 and 31 of the transcript of proceedings on said hearing of January 12, 1924, and were as follows:

"Mr. CASSELL.—If your Honor please, in behalf of the complainant and the seven Bank claimants, The First National Bank of Boston, National Shawmut Bank of Boston, The First National Bank of Chicago, National City Bank, National Bank of Commerce in New York, The First National Bank of St. Louis, and Old Colony Trust Company, we desire to enter the following objections to the settlement of certain items of the account: [45]

There are a number of items in the accounts, if your Honor please, which deal with the Lesher transaction to which Mr. Smith has testified; I have not the exact numbers of those, but I can fur-

nish them to your Honor; and we enter objection to the allowance of those at the present time upon the ground that no application was made to the Court authorizing the receiver to take over the agreement, or to make the payments; no reason was shown for not making such application, and no notice was given, either formal or otherwise, to the complainant or claimants, or any of their attorneys, although opportunity was had therefor; and for that reason the item should not be allowed at this time. [47]

We also ask for an order of the Court directing the receiver not to pay any further amounts on account of the purchase of the so-called Lesher property.

The COURT.—Do you think those orders should be made, and the receiver permitted to sell that land to anyone to whom he sees fit to sell it?

Mr. GREENE.—It is entirely satisfactory to the creditors that that course be followed.

The COURT.—Suppose he sells that to some one to use as a wedge or key to this property? I would like to have something more on that than your objection, Mr. Greene. I have lived in a cattle country a good many years, and while I was never a cattle man, and never owned any stock myself, I have heard much of situations of that kind, of men being put in a position where they were almost at the mercy of someone else; the depreciation that follows from such a condition to large range rights is a serious consideration. It is one that perplexes and troubles me, and I do not feel like de-

ciding the matter on the assertion of some one that it is a good buy, and the assertion of some one else that it is objectionable.

Mr. GREENE.—Perhaps I should have in the first instance made this further explanation: The creditors feel very strongly that to take this money out of the funds to which they, along with the creditors whom I do not represent, must resort, will be, in the last analysis, simply a depletion of the fund out of which they must ultimately get their dividend. If it is a factor of moment to any one of the parties, it is one primarily to the trustee, because in our judgment, a judgment based on the best information we have, when the time comes for this property to be liquidated [49] —we hope it will be short—the liquidation of the Spanish Ranch is something with which the unsecured creditors will be absolutely unconcerned; in other words, they don't propose to bid for that ranch, and it will go to some one else. Now, to take the money which would otherwise be available for distribution to unsecured creditors as a whole, and put it into the purchase of real estate, out of which they will reap no actual benefit, is a course they don't want the Court to follow unless the Court feels impelled to do it.

Mr. CASSELL.—If your Honor please, in connection with the application of the receiver concerning the Lesher property, there were three vouchers to be put in, which accompanied the receiver's accounts, which showed the early payments,

the first payments under the Lesher contract. The first one was shown apparently in the account for June, 1922, and was covered by voucher number 20222. This voucher covered other matters, and showed among such matters a payment of $1,000, under date of June 21, 1922; the voucher read: "Winters Ranch, Nevada, June 21, 1922, R. M. Lesher, lease of Lesher or Good Hope Ranch, in full season 1922, $1,000," and marked "Received draft No. 9511 in payment," "R. M. Lesher, George H. Calligan." Endorsed on the face of the voucher were the letters "Land Rent," and attached to the voucher was also a check on the Union Land and Cattle Company form of check, number 9511, for $1,000, signed George H. Calligan, in favor of R. M. Lesher. The second payment of $1,000 is shown on the September, 1923, account, and is covered by voucher number 22114, and is for $1132.63, and was endorsed "Land Rent." Accompanying it were a number of memoranda, showing that this payment of $1132.63 covered the principal payment of $1,000, and in addition to that a balance of interest and taxes paid. It showed that the [50] payment had been made by Mr. Calligan to Mr. Lesher in December of 1922, and that Mr. Lesher had directed the Union Land and Cattle Company to make repayment to Mr. W. H. Moffat, who, in turn, allowed a corresponding credit to Mr. Calligan.

The COURT.—That was in 1923.

Mr. CASSELL.—The item appeared in the September, 1923, account, at which time the reimbursement was made to Mr. Moffat, but the payment to

Mr. Lesher had been made in December, 1922. Accompanying this voucher was a check, dated September 1, 1923, in favor of W. H. Moffat, for $1132.63, and signed by the Union Land and Cattle Company. I think with that statement of those vouchers it is unnecessary to put the vouchers themselves in.

Mr. BELFORD.—Is there any explanation you wanted in reference to those vouchers?

Mr. CASSELL.—I think that is a sufficient explanation. It shows the two vouchers were entered in the accounts at the time they were presented to the Court, and presented for the first time to the notice of the creditors of the Union Land and Cattle Company, and endorsed "Land Rent."

The final one, covering the $4,000 payment, was included in the July, 1923, account; and simply shows a payment to Mr. W. T. Smith of $4,241.33; and attached to it was a check in that amount from the Union Land and Cattle Company to Mr. Smith, dated July 18th, 1923. There is also attached to the voucher a letter, explaining that Mr. Smith had made a payment on account of the contract. The Court will bear in mind that all of the accounts from May, 1923, to November, 1923, were not presented until January 12, 1924.

Mr. BROWN.—Some of them were presented earlier, but not heard. [51]

Mr. CASSELL.—They had not been served.

Mr. BROWN.—Notices of them had been served.

Mr. CASSELL.—But the accounts themselves had

not been handed to us until shortly before the hearing in January, 1924. That is all.

Mr. BELFORD.—With regard to the Lesher contract, I would like to call the attention of the Court to the fact, if the money is to be paid it must be paid to-morrow, and if possible we would like a ruling upon that matter, because the time of the receiver is extremely limited to make that payment; and our understanding is that unless it is paid, we will lose not only the land, but the amounts heretofore paid will be forfeited.

The COURT.—Well, if there is nothing to be said I will dispose of it.

Mr. GREENE.—We have already voiced our objection, your Honor; we could do no more than repeat what I said before.

The COURT.—Well, the order will be that the purchase shall be completed.

Mr. GREENE.—Of course we have already told counsel, and they appreciate that we intend to appeal from that order.

The COURT.—I so understood it. It is my duty, as I understand it, to exercise my judgment, and it seems to me that a failure to purchase this land will be a very serious matter, and will depreciate the value of the range. If some tramp sheepman takes possession of that 1200 acres of land, it will be almost impossible for the company to range their cattle on that particular tract of country, and it will certainly be difficult for them to utilize that range for their sheep. It seems to me the only proper [52] way to preserve the value of that

property is to secure the 1200 acres of land. Anything you can do to facilitate the immediate presentation of the matter to the Circuit Court of Appeals will certainly be hastened and speeded in any way I can.

Mr. BELFORD.—In that connection, if the Court please, I also ask that an order be entered approving and confirming the payments heretofore made.

The COURT.—I think those have already been approved, have they not?

Mr. BELFORD.—Except the four thousand.

The COURT.—Yes, the $2,000 has already been approved; and I understood that $4,000 had been approved.

Mr. GREENE.—That is before your Honor now.

The COURT.—Oh that was the one to which exceptions were taken at the last hearing?

Mr. BELFORD.—Yes.

The COURT.—Well, all three payments heretofore made will be approved.

Mr. GREENE.—We note an exception. [53]

The foregoing constitutes a full and complete statement of all of the evidence, documentary and oral, offered or presented on the trial and hearing of the petition of W. T. Smith, the receiver of the above-named defendant Union Land and Cattle Company, filed in the above-entitled cause on May 26, 1924, for an order authorizing said W. T. Smith, as receiver aforesaid, to pay to R. M. Lesher the sum of four thousand two hundred forty-one and 33/100 (4,241.33) dollars as a final payment on a contract for the purchase by said receiver of certain

lands belonging to said Lesher, and confirming and approving previous payments of one thousand (1,000) dollars, one thousand (1,000) dollars, and four thousand, two hundred forty-one and 30/100 (4,241.30) dollars on account of said contract, and also of all the proceedings had thereon; and the foregoing is herewith presented by the said interveners as and for their statement for use upon their appeal from the order of the above-entitled court in the above-entitled cause, made and filed on August 4, 1924, upon said petition.

Dated: October 3, 1924.

McCUTCHEON, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners. [54]

STIPULATION RE STATEMENT OF EVIDENCE.

IT IS HEREBY STIPULATED by and between the respective parties hereto, as follows:

(1) That the foregoing statement is a true, complete and properly prepared statement of the evidence adduced upon the trial and hearing of the petition of W. T. Smith, the receiver of the above-named defendant Union Land and Cattle Company, filed in the above-entitled cause on May 26, 1924, for an order authorizing said W T. Smith as re-

ceiver as aforesaid, to pay to R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 (4,241.33) Dollars as a final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher, and confirming and approving previous payments of One Thousand (1,000) Dollars, One Thousand (1,000) Dollars, and Four Thousand Two Hundred Forty-one and 30/100 (4,241.30) Dollars on account of said contract, and of all of the said evidence, both documentary and oral, offered or presented upon said trial and hearing, and also of all the proceedings had thereon;

(2) That the foregoing statement may be approved by the above-entitled court and be settled as and for the statement to be used by the said interveners upon their appeal from the order of said Court in said cause made on August 4, 1924, upon said petition;

(3) That the foregoing statement may be used as a statement of the evidence of said Interveners upon the appeal by said interveners from the said order of August 4, 1924, granting the [55] said petition of said receiver filed May 26, 1924.

Dated: ——, 1924.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners.

_____,
_____,
_____,
Attorneys for Said W. T. Smith as Receiver for Said Union Land and Cattle Company.

_____,
Attorneys for Defendant Union Land and Cattle Company and for W. T. Hitt, Emma, McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey.

_____,
Attorney for Silveria Garat. [56]

ORDER APPROVING STATEMENT OF EVIDENCE.

Good cause appearing therefor, the foregoing statement is hereby found to be a true, complete and properly prepared statement of the evidence upon the trial and hearing of the above-mentioned petition of said receiver, filed May 26, 1924, and of all proceedings had thereon, and as such it is approved;

It is further ordered that said statement may be used by the said interveners herein upon their appeal from said order of August 4, 1924, upon said petition.

Dated: November 20th, 1924.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: No. B–11—In Equity. District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant, Old Colony Trust Company, a Corporation, et al., Interveners. Statement of Evidence for Use on Appeal by Interveners from Order Authorizing and Confirming Payment on Account of Lesher Purchase. Filed Nov. 20, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [57]

In the District Court of the United States, in and for the District of Nevada.

IN EQUITY—B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND & CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable EDWARD S. FARRINGTON, District Judge of the United States in and for the District of Nevada:

The above-named interveners, Old Colony Trust Company, a Corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, [58] and each of them, feeling themselves aggrieved by the order and decree entered in this cause on the 4th day of August, 1924, authorizing W. T. Smith, as receiver of the above-

named defendant, Union Land and Cattle Company, in the above-entitled action, to pay to R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 Dollars ($4,241.33) as the final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher, and confirming and approving previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000), and Four Thousand Two Hundred Forty-one and 30/100 Dollars ($4,241.30) on account of said contract, do, and each of them does, jointly and severally appeal from the said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herein, and said interveners jointly and severally pray that such appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers in said matter, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their said appeal be made.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for said Interveners. [59]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

The above petition is hereby granted and the above appeal is hereby allowed upon the said petitioners and interveners giving bond conditioned as required by law in the sum of Five Hundred Dollars ($500).

Dated October 31st, 1924.

E. S. FARRINGTON,
Judge of the District Court of the United States for the District of Nevada.

[Endorsed]: No. B–11—In Equity. In the District Court of the United States for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, a Corporation, et al., Interveners. Petition for Appeal and Order Allowing Same. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California [60]

In the District Court of the United States, in and for the District of Nevada.

IN EQUITY—No. B-11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

ASSIGNMENT OF ERRORS.

Now come the interveners above named, Old Colony Trust Company, a Corporation, The First National Bank of Boston, a National Banking As-

sociation, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, and as a part of their prayer for an appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above-entitled court made and entered herein on the [61] 4th day of August, 1924, authorizing W. T. Smith as receiver of the above-named defendant, Union Land and Cattle Company, in the above-entitled action to pay to R. M. Lesher the sum of Four Thousand Two Hundred forty-one and 33/100 Dollars ($4,241.33) as the final payment on a contract for the purchase by said Receiver of certain lands belonging to said Lesher and confirming and approving the previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000) and Four Thousand Two Hundred Forty-one and 30/100 Dollars ($4,241.30) on account of said contract, tender and file this their assignment of errors, to wit:

1. Said District Court erred in said order of August 4, 1924 in authorizing said W. T. Smith as receiver of said Union Land and Cattle Company to pay to R. M. Lesher the said sum of Four Thousand Two Hundred Forty-one and 33/100 Dollars ($4,241.33) as the final payment on the contract for the purchase by said receiver of lands belonging to

said Lesher; and in confirming and approving the previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000) and Four Thousand Two Hundred Forty-one and 30/100 Dollars ($4,241.30) in the same transaction, for the reason that in so doing said District Court abused its discretion;

2. Said District Court erred in said order of August 4, 1924 in authorizing said W. T. Smith to make said payments as aforesaid and in confirming and approving said previous payments because the purchase of said lands by said receiver and the making of said payments constituted an application by said receiver of funds of said Union Land and Cattle Company in his hands as such receiver to a capital investment in land and to the carrying out of a policy of continued operation in lieu of a policy [62] of retrenchment, the former course having been enjoined upon said District Court and said receiver, and the latter course having been condemned, by the Circuit Court of Appeals for the Ninth Circuit in its orders and opinions filed on April 7, 1924 in appeals Nos. 4195 and 4196;

3. Said District Court erred in said order of August 4, 1924 in authorizing said W. T. Smith as receiver as aforesaid to make said payments and in confirming and approving said previous payments, because the purchase of said property from said R. M. Lesher and the making of the said payments constituted disobedience to the opinion and mandate of the Circuit Court of Appeals for

the Ninth Circuit, dated April 7, 1924, and May 8, 1924, respectively, in appeals Nos. 4195 and 4196;

4. Said District Court erred in authorizing said receiver to make said payments and in approving and confirming said previous payments for the reason that the purchase of said lands from said R. M. Lesher and the application by said receiver of funds of the said Union Land and Cattle Company in his hands as such receiver to the payment of the purchase price thereof constituted a withdrawal of said funds so paid from a fund available to said interveners and the unsecured creditors of the Union Land and Cattle Company and a converting of said funds into real property, which would not be available to said interveners and said unsecured creditors of said Union Land and Cattle Company.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for said Interveners. [63]

[Endorsed]: In Equity—No B–11. District Court of the United States, in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant, Old Colony Trust Company a Corporation, et al., Inter-

veners. Assignment of Errors. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [64]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, A National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, the First National Bank of Chicago, a National Banking Association, as principal, and Fidelity & Deposit Company of Maryland, as surety, acknowledge ourselves to be indebted to the above-named Union Land and Cattle Company, a corporation, W. T. Smith, as receiver thereof, Silveria Garat, W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey, and J. W. Dorsey, the appellees in the above-entitled cause, in the sum of Five Hundred Dollars ($500.00), conditioned that whereas on the 4th day of August, 1924, in the District Court of the United States for the District of Nevada, in a suit pending in that court wherein The First National Bank of San Francisco, a corporation, was complainant, and the above-named Union [65] Land and Cattle Company, a corporation, was defendant, an order and decree was rendered authorizing said W. T. Smith as receiver of the above-named defendant, Union Land and Cattle Company, in the above-entitled action to pay to R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 Dollars ($4,241.33) as the final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher and confirming and approving the previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000) and Four Thousand Two Hundred Forty-

one and 30/100 Dollars ($4,241.30) on account of said contract, and the above-named interveners, Old Colony Trust Company, The First National Bank of Boston, National Bank of Commerce in New York, The First National Bank in St. Louis, National Shawmut Bank of Boston, National City Bank and First National Bank of Chicago, having been granted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation directed to said Union Land and Cattle Company, a corporation, and said W. T. Smith, as receiver of said Union Land and Cattle Company, as appellees, citing and admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals to be holden in the City of San Francisco, State of California, on the 29th day of November, 1924 next.

Now, if said interveners shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above application to be void; else to remain in full force and effect.

FIRST NATIONAL BANK OF CHICAGO.
By A. CRAWFORD GREENE,
Its Attorney-in-fact.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.
[Seal] By C. R. CARTER,
Its Attorney-in-fact. [66]

ORDER APPROVING BOND ON APPEAL.

The above bond is hereby approved this 31st day of October, 1924.

E. S. FARRINGTON,

Judge of the District Court of the United States in and for the District of Nevada.

[Endorsed]: No. B–11—In Equity. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, a Corporation, et al., Interveners. Bond on Appeal. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [67]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

STIPULATION AND ORDER THAT EXHIBITS MAY BE SENT UP AS PART OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the following exhibits offered upon the trial of the petition of W. T. Smith, receiver of the above-named Union Land and Cattle Company, for an order authorizing him as such receiver to pay to R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 Dollars ($4,241.33), as the final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher, and confirming and approving previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000), and Four Thousand Two Hundred Forty-one and 30/100 Dollars ($4,241.30) on account of said [68] contract, and now on file in the office of the Clerk

of the above-entitled court, may be sent up on appeal to the Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal from the order and decree entered in the above-entitled cause on August 4, 1924, granting said petition, namely the following exhibits:

Petitioners' Exhibit "A"—map of property covered by said contract;

Petitioners' Exhibit "B"—map of said property.

BROWN & BELFORD,
J. W. DORSEY and
W. E. CASHMAN,

Attorneys for Said W. T. Smith, Receiver of Said Union Land and Cattle Company.

J. W. DORSEY and
W. E. CASHMAN,

Attorneys for Defendant, Union Land and Cattle Company, and for W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Francis C. Rickey, W. H. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners.

FRED L. DREHER and
W. E. CASHMAN,
Attorneys for Silveria Garat.

[Endorsed]: No. B–11—In Equity. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, a Corporation, et al., Interveners. Stipulation and Order That Exhibits may be Sent Up as Part of Record on Appeal. Filed Nov. 20, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [69]

In the District Court of the United States in and for the District of Nevada.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF

BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Intervenors.

PRAECIPE FOR TRANSCRIPT OF RECORD.

The petitioners and interveners herein, Old Colony Trust Company, a corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First National Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, in compliance with Equity Rule No. 75, hereby indicate the portions of the record to be incorporated in the transcript upon appeal of said interveners from the order entered in the above-entitled cause on August 4, 1924, referred to in the petition [70] for appeal herein, as follows:

(1) Petition of W. T. Smith, receiver, for instructions authorizing him as receiver of the Union Land and Cattle Company to pay to R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 Dollars ($4,241.33) as the final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher,

and confirming and approving the previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000), and Four Thousand Two Hundred Forty-one and 30/100 Dollars ($4,241.30) on account of said contract.

(2) Minute order dated June 20, 1924, submitting above petition for decision.

(3) Opinion covering above filed August 4, 1924.

(4) Order covering above filed August 4, 1924.

(5) Statement of evidence.

(6) Petition for appeal and order allowing same.

(7) Assignment of errors.

(8) Bond on appeal and order approving same.

(9) Citation on appeal.

(10) Stipulation concerning exhibits.

(11) This praecipe on appeal.

McCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
A. CRAWFORD GREENE,
GEORGE B. THATCHER,
Attorneys for Said Interveners. [71]

[Endorsed]: No. B–11—In Equity. In the District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant. Old Colony Trust Company, a Cor-

poration, et al., Interveners. Praecipe for Transcript of Record. Filed Oct. 31, 1924. E. O. Patterson, Clerk. McCutchen, Olney, Mannon & Greene, Attorneys for Interveners, Balfour Building, San Francisco, California. [72]

In the District Court of the United States for the District of Nevada.

No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant, said case being No. B–11 on the docket of said court. [73]

I further certify that the attached transcript, consisting of 74 typewritten pages numbered from 1 to 74, inclusive contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the city of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $36.05, has been paid to me by Messrs. McCutchen, Olney, Mannon & Greene, attorneys for the interveners in the above-entitled cause.

And I further certify that the original writ of error, issued in this cause, is hereto attached.

WITNESS my hand and the seal of said United States District Court, this 28th day of November, A. D. 1924.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.

[74]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–11.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, a Corporation,

Complainant,

vs.

UNION LAND AND CATTLE COMPANY, a Corporation,

Defendant;

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National

Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Interveners.

CITATION.

United States of America to Union Land and Cattle Company, a Corporation, W. T. Smith, Receiver of Said Union Land and Cattle Company, Under and by Virtue of That Certain Order Given and Made by the Above-entitled Court in the Above-entitled Action on July 28, 1920, Silveria Garat, W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey, and J. W. Dorsey, GREETING:

You and each of you are hereby notified that in that certain cause in equity in the United States District Court in and for the District of Nevada, wherein The First National Bank of San Francisco, a corporation, is complainant, and Union Land and Cattle Company, a corporation, is defendant, and in which W. T. Smith was by an order of said Court duly given and made on July 28, 1920, appointed receiver of the properties of said Union Land and Cattle Company, specified in said order, an order and decree was made and entered on August 4, 1924, authorizing W. T. Smith as receiver of the above-named defendant, Union Land and Cattle Company, in the above-

entitled action to pay to R. M. Lesher the sum of Four Thousand Two Hundred Forty-one and 33/100 Dollars ($4,241.33) as the final payment on a contract for the purchase by said receiver of certain lands belonging to said Lesher, and confirming and approving the previous payments of One Thousand Dollars ($1,000), One Thousand Dollars ($1,000) and Four Thousand Two Hundred Forty-one and 30/100 Dollars ($4,241.30) on account of said contract, and an appeal to the United States Circuit Court of Appeals for the Ninth Circuit has been allowed to the above-named interveners in said cause, and each of them, from said last-mentioned order.

You, and each of you, are hereby cited and admonished to be and appear in said court at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the said order and decree so appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable EDWARD S. FARRINGTON, Judge of the United States District Court in and for the District of Nevada, this 31st day of October, 1924.

E. S. FARRINGTON,
United States District Judge.

[Seal] Attest: E. O. PATTERSON,
Clerk.

Service of the within citation and receipt of a copy is hereby admitted this 25th day of November, 1924.

J. W. DORSEY and
W. E. CASHMAN,

Attorneys for Appellees Union Land and Cattle Company, W. T. Smith, as Receiver Thereof, W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey and J. W. Dorsey.

FRED L. DREHER,
Attorney for Silveria Garat.

BROWN & BELFORD,
Attorneys for W. T. Smith, Receiver.

[Endorsed]: In Equity—No. B–11. District Court of the United States in and for the District of Nevada. The First National Bank of San Francisco, a Corporation, Complainant, vs. Union Land and Cattle Company, a Corporation, Defendant; Old Colony Trust Company, a Corporation, et al., Interveners. Citation. Filed Oct. 31, 1924. E. O. Patterson, Clerk.

[Endorsed]: No. 4410. United States Circuit Court of Appeals for the Ninth Circuit. Old Colony Trust Company, a Corporation, The First National Bank of Boston, a National Banking Association, National Bank of Commerce in New York, a National Banking Association, The First Na-

tional Bank in St. Louis, a National Banking Association, National Shawmut Bank of Boston, a National Banking Association, National City Bank, a National Banking Association, and First National Bank of Chicago, a National Banking Association, Appellants, vs. Union Land and Cattle Company, a Corporation, W. T. Smith, as Receiver of Said Union Land and Cattle Company, Under and by Virtue of That Certain Order Given and Made by the District Court for the District of Nevada, on July 28, 1920, Silveria Garat, W. T. Hitt, Emma McLaughlin, Henrietta Moffat, Maud B. Clemons, Frances C. Rickey, W. A. Dill, W. H. Frazer, Elizabeth Sharp, Mrs. Aloysius Davey, and J. W. Dorsey, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed November 29, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4410

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLD COLONY TRUST COMPANY, a corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

vs.

UNION LAND & CATTLE COMPANY, a corporation, and W. T. SMITH, Receiver of said Union Land & Cattle Company, Under and By Virtue of that Certain Order Given and made by the District Court for the District of Nevada, on July 28, 1920, SILVERIA GARAT, W. T. HITT, EMMA MCLAUGHLIN, HENRIETTA MOFFAT, MAUD B. CLEMONS, FRANCES C. RICKEY, W. A. DILL, W. H. FRAZER, ELIZABETH SHARP, MRS. ALOYSIUS DAVEY, and J. W. DORSEY,

Appellees.

BRIEF FOR APPELLANTS.

MCCUTCHEN, OLNEY, MANNON & GREENE,
THATCHER & WOODBURN,
WARREN OLNEY, JR.,
J. M. MANNON, JR.,
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Attorneys for Appellants.

Parker Printing Company, 346 Sansome Street, San Francisco

Table of Contents

		Pages
I.	STATEMENT OF THE CASE	1-12
	The circumstances under which the order appealed from was made by the District Court	3-7
	The circumstances under which the purchase was made by the Receiver	7, 8
	By applying this sum of $10,000 to the purchase of its lands, the fund available to the unsecured creditors is depleted and that which is subject to the lien of the bond mortgage is increased	8, 9
	The grounds upon which the District Court seeks to sustain the order are invalid	10-12
II.	ASSIGNMENTS OF ERROR	12, 13
III.	BRIEF OF THE ARGUMENT	13 - 30
	(1) It is error for a court to authorize the receiver of a private corporation to invest in land. Under the circumstances here shown, the order appealed from was clearly an abuse of discretion	13 - 18
	(2) The order of August 4, 1924, authorizing the purchase of the Lesher lands and the payment of $10,000 plus interest, therefor, is in violation of the mandate of this court in Appeals Nos. 4195 and 4196	18 - 19
	(3) The order authorizing the purchase of the Lesher lands and the expenditure of $10,000 thereon by the Receiver is invalid as to appellants because it takes from them $10,000 and transmutes it into property which becomes subject to the lien of the bond mortgage	20 - 21
	(4) The points relied upon by the court and the Receiver in justification of the purchase are invalid	21 - 30

Pages

(a) The contention of the District Court and the Receiver that the purchase of the lands was essential to the protection of the Spanish Ranch is insufficient ..... 22 - 25

(b) The contentions of the District Court and of the Receiver that the lands are worth at least the price paid for them ..... 25 - 27

(c) The argument of the District Court and the Receiver that failure to approve the purchase would result in the loss of the amounts already paid ..... 27 - 30

No. 4410.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLD COLONY TRUST COMPANY, a corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

vs.

UNION LAND & CATTLE COMPANY, a corporation, and W. T. SMITH, Receiver of said Union Land & Cattle Company, Under and By Virtue of that Certain Order Given and made by the District Court for the District of Nevada, on July 28, 1920, SILVERIA GARAT, W. T. HITT, EMMA MCLAUGHLIN, HENRIETTA MOFFAT, MAUD B. CLEMONS, FRANCES C. RICKEY, W. A. DILL, W. H. FRAZER, ELIZABETH SHARP, MRS. ALOYSIUS DAVEY, and J. W. DORSEY,

Appellees.

BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

This appeal is related to Appeal No. 4409, with which it is submitted.

The appeal is from an order of the United States District Court for the District of Nevada, made on August 4, 1924, in an action pending in said District Court entitled "The First National Bank of San Francisco, a Corporation, Complainant, v. Union Land and Cattle Company, Defendant," and numbered "In Equity B-11". By the order complained of, the District Court approved the action of W. T. Smith, the Receiver appointed by it in said action No. B-11, in purchasing from one R. M. Lesher a tract of approximately 1,200 acres of land situate in Elko County, Nevada, and in paying therefor the sum of $10,000 and interest out of moneys of the Cattle Company in his hands as such Receiver.

The appellants are the same seven Eastern banking corporations who appear as appellants in Appeal No. 4409 and are unsecured creditors of the Union Land and Cattle Company in principal amounts aggregating $1,800,000. They have been permitted to intervene in said action No. B-11 and in that action their claims were allowed in full on March 1, 1924, as proper unsecured claims against the Union Land and Cattle Company. Since May, 1923, they have been persistently endeavoring, both before the District Court and before this court, to bring about the sale and liquidation of the assets of the Cattle Company; the application of the proceeds of such sale *pro tanto* in satisfaction of their own claims and the claims of the other unsecured creditors of the Cattle Company; and, finally, the termination of the receivership.

The circumstances under which the order appealed from was made by the District Court.

The order authorizing the purchase and the payment of the purchase price by the Receiver was made, as above stated, on August 4, 1924.

It is necessary to go back and to outline the status of the receivership at the time this order was made in order to understand its full import.

Action No. B-11, in which the order complained of was made, was commenced on July 28, 1920. At that time the Union Land and Cattle Company was indebted to appellants and to The First National Bank of San Francisco (the complainant in Action No. B-11) upon unsecured notes either due or soon to become due, the principal amounts of which aggregated $2,200,000. In addition, it owed on unsecured commercial paper, either due or about to become due, approximately $650,000. In addition, it owed to the so-called Nevada creditors unsecured debts the principal amount of which aggregated approximately $500,000. It also owed approximately $1,000,000 upon a bond mortgage, the principal amount of the indebtedness secured by which had been originally $1,200,000. This bond mortgage was secured by a deed of trust embracing approximately 224,000 acres of land in the State of Nevada owned by the Cattle Company and approximately two-thirds of the capital stock of the Antelope Valley Land and Cattle Company, a subsidiary corporation.

The total holdings of the Union Land and Cattle Company including the properties owned by its sub-

sidiaries, the said Antelope Valley Land and Cattle Company and the McKissick Land and Cattle Company, comprised approximately 350,000 acres of land in the State of Nevada and in counties of the State of California bordering Nevada, together with approximately 50,000 head of cattle and 50,000 head of sheep, and together with horses and ranch equipment sufficient to make possible the carrying on of the enterprise.

The receivership action was commenced on July 28, 1920, and W. T. Smith was appointed Receiver, to meet the situation created by the insolvency of the company; to prevent the dismemberment of the property, if possible, and to draw together all of the large number of creditors of the Cattle Company.

The first two or three years of the receivership were occupied in endeavors to bring about a reorganization. These efforts failed in the spring of 1923 and the conflict then arose, with which this court is familiar, between the complainant in the action and the intervening banks upon the one hand, urging the speedy liquidation of the assets of the receivership and the termination of the receivership itself, and the Union Land and Cattle Company and the Nevada creditors upon the other hand, the latter seeking the continuation of the receivership and the carrying on of its activities as a going concern in the hope of improved market conditions in the livestock business and in the market for livestock properties in the State of Nevada.

In August, 1923, the complainant and the seven intervening banks (the present appellants) filed petitions in

the District Court in action No. B-11, asking that the Receiver be directed to sell the properties of the Union Land and Cattle Company immediately and bring the receivership to a conclusion. In October, 1923, the Receiver filed a petition asking for leave to invest $110,000 in additional livestock and for leave to borrow money therefor and to issue Receiver's certificates for the moneys so borrowed. The petition of the seven banks for liquidation and the petition of the Receiver for leave to invest, etc., were heard by the District Court and decided on November 3, 1923, the District Court denying the order for liquidation and granting the petition of the Receiver for authority as prayed for. Appeals were prosecuted by the complainant and the seven banks from these orders and were argued and submitted to this court on March 28, 1924.

Upon Appeal No. 4195, involving the order of liquidation, this court modified the order of the District Court and directed the District Court to proceed to liquidate the properties of the Cattle Company in accordance with principles laid down in this court's opinion. Upon Appeal No. 4196, involving the authorization of the Receiver to invest in livestock, etc., this court reversed the order of the District Court. The decision and opinion of this court was rendered on April 7, 1924. In deciding these two appeals, this court said:

> "The cattle company is a private corporation, in every sense of the word, engaged in a private enterprise, and the magnitude of its holdings does not change its character or give it immunities not enjoyed by other debtors. For almost four years

> the processes of the courts against its property have been stayed, to enable it to rehabilitate itself and refund or liquidate its indebtedness. Nothing has been accomplished by it during that period, and henceforth the rights of creditors should be the chief concern of the courts. There is no reason or excuse for further continuance of the receivership, except to make a sale of the property for the best price and on the best terms obtainable, and there should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes." * * * "As already stated, the order authorizing the incurring of an indebtedness of $110,000. for the purchase of additional cattle and sheep, seems inconsistent with a policy of speedy liquidation. Such orders may have been justified in the earlier stages of the receivership, but the time has arrived when there should be retrenchment instead of expansion."

Following the decision of this court in Appeals Nos. 4195 and 4196, the Receiver applied to the District Court on May 23, 1924, for instructions as to how to proceed in the matter of liquidation. On May 26, 1924, the Receiver also filed the petition upon which the order herein appealed from was based. In said petition he recited that he had made a contract for the purchase of the property in question from R. M. Lesher for $10,000 with interest, and asked the District Court to authorize him to make a final payment of $4,241.33 which became due thereon on June 21, 1924. The petition of the Receiver for instructions and the petition for approval of the purchase and the authorization to make payments came on for hearing on June 18, 1924. On August 4, 1924, the District Court decided both matters

in a single order in which he instructed the Receiver as to how he should proceed in the matter of liquidation and *ratified the action of the Receiver in making the purchase of the land from Lesher, approving the payments which the Receiver had already made, aggregating $6,000, with interest, and authorizing the payment of the $4,241.33, constituting the final payment as aforesaid.*

It appears, therefore, that the District Court's sanction to the purchase of these 1,200 acres of land from R. M. Lesher and to the expenditure by the Receiver of $10,000 with interest out of the funds of the Cattle Company in his hands as Receiver, came after this court had sent down its mandate in Appeals Nos. 4195 and 4196 directing the District Court to liquidate "for the best price and on the best terms obtainable"; that there "should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes"; and stating that "*the time has arrived when there should be retrenchment instead of expansion*".

The circumstances under which the purchase was made by the Receiver.

The contract for the purchase of the property from R. M. Lesher was entered into under date of June 13, 1922. The contract itself is set out in the record (Tr. pp. 38-43). It was entered into between R. M. Lesher as seller and George H. Calligan as purchaser. Calligan was foreman for the so-called Spanish Ranch of the Union Land and Cattle Company. Calligan later assigned the contract to Mr. Smith, the Receiver. The

contract provided that the purchase price should be $10,000, with interest on deferred payments at 6%. The purchase price was payable as follows:

$1,000 on the date of the contract, June 23, 1922;

$1,000 on or before December 1, 1922;

$4,000 on or before June 21, 1923;

$4,000 on or before June 21, 1924.

The first two payments of $1,000 appeared in the Receiver's contemporaneous accounts *as items of rent,* no reference being made to the contract. The first reference to the contract was made in the Receiver's account for July, 1923, in which the item of $4,241.33 appeared as a payment on account of the purchase price of the Lesher property. The July, 1923, account was not heard until February, 1924, at which time upon the objection of these appellants, the court refused to allow the item because no formal application for authorization of the Receiver to purchase the Lesher property had been made. The first formal application by the Receiver for approval of the purchase of this land was, therefore, the one which was embodied in the petition filed as aforesaid on May 26, 1924, and it was decided by the District Court on August 4, 1924.

By applying this sum of $10,000 to the purchase of its lands, the fund available to the unsecured creditors is depleted and that which is subject to the lien of the bond mortgage is increased.

Appellants' objection to the course taken by the District Court in this matter rests not only upon the

proposition that the purchase of these lands is opposed to a policy of liquidation and is part of a policy of expansion rather than a policy of retrenchment, in violation of this court's mandate in Appeals Nos. 4195 and 4196, but upon the further proposition that it constitutes, at a time when the receivership is on the point of terminating, a withdrawal of $10,000 from the fund from which these appellants and the other unsecured creditors of the Union Land and Cattle Company must be paid, and an application of such moneys to the purchase of property which becomes subject to the lien of the secured creditors under the bond mortgage.

The general funds in the hands of the Receiver are subject to the payment of the unsecured creditors, for the reason that the bond mortgage by its express terms covers *only* the real estate in Nevada belonging to the Union Land and Cattle Company and approximately two-thirds of the stock of the Antelope Valley Land and Cattle Company. Under the order appealed from, the Receiver takes $10,000 from this fund, which is available to the unsecured creditors, and transmutes it into real estate which forthwith becomes subject to the lien of the bond mortgage and, therefore, not subject to the satisfaction of the claims of the unsecured creditors. This constitutes an additional and a very impelling reason against the course taken by the District Court in this matter.

The grounds upon which the District Court seeks to sustain the order are invalid.

The District Court, in the opinion which it filed on August 4, 1924, gives its reasons for authorizing the purchase of these lands, saying:

> "The purchase of the Lesher land does not at first view seem like liquidation, but on careful consideration it appears to me that its acquisition is not only vital, but that it will facilitate rather than delay sale of the Spanish Ranch. In itself it is well worth the money asked. It is in the mountains and is covered with a large amount of feed; this, with its elevation, makes it valuable as summer range, and especially so in a dry year. Several hundred steers can be fattened thereon each season. It possesses a singular strategic value due to its location in the heart of a large and valuable range used and claimed in connection with the Spanish Ranch. An independent owner of the tract can graze sheep over the surrounding range in such manner as to take much of its use and value away from those who may be operating the Spanish Ranch. Incomplete control of the range, if a fact, will be given much weight by any one contemplating purchase of this portion of the property. The receiver was therefore orderded to complete the purchase of the Lesher land."
>
> (Tr. pp. 12-13).

These reasons are purely matters of expediency.

Even upon the ground of expediency, they are inadequate for reasons which we shall later show. But, on any view they afford no answer to the elements of primary injustice inflicted upon the appellants by this order.

The Union Land and Cattle Company is a private concern. It has been in the hands of the Receiver and of the District Court for upwards of five years. All of the claims against the Union Land and Cattle Company have been adjudicated and no issues whatever remain to be litigated. All this has been emphatically pointed out by this court in its opinion of April 7, 1924, in Appeals Nos. 4195 and 4196. Under such circumstances, the duty of the District Court is to liquidate and terminate the receivership and not to take funds in the hands of the Receiver and buy tracts of land which it may deem valuable in connection with tracts of land already owned. Much more apparent than in the usual case does this appear when it is considered that the real estate holdings of the Union Land and Cattle Company in Nevada have been totally unsalable through the entire period of the receivership and the depressed condition of the livestock and real estate market in the State of Nevada is considered.

This order authorizing the investment of $10,000 in additional lands is made in the teeth of the mandate of this court in Appeal No. 4196, condemning the course taken by the District Court in ordering the investment of any further moneys in livestock. If (a year and a half ago) it was error for the District Court to employ the funds in the hands of the Receiver in buying livestock which could be put upon the ranges already owned by the Cattle Company, much more so must it appear erroneous for the District Court to employ funds in the hands of the Receiver in buying additional lands.

Finally, it appears that another element of injustice to appellants lies in this order. By the order $10,000 was taken out of a fund which could be used to satisfy the claims of the unsecured creditors and irretrievably placed beyond their reach. The $10,000, if left in the hands of the Receiver, would all go to the satisfaction of the unsecured creditors' claims. If the order stands, and the Lesher lands are purchased, the said lands will come under the lien of the bond mortgage and will be available to the secured creditors but not to the unsecured creditors or to appellants.

II. ASSIGNMENTS OF ERROR.

Appellants assign as error and abuse of discretion the making of the order of August 4, 1924, authorizing the Receiver to make the final payment of $4,241.33 on account of the purchase of the Lesher lands and confirming and approving the previous payments on account of the purchase price of said lands of $1,000, $1,000 and $4,241.30 (Assignment of Error No. 1; Tr. pp. 67, 68).

Appellants assign as error the making of the order aforesaid for the reason that the course approved by such order constitutes the authorization of a capital investment in land and the authorization for the carrying out of a policy of continued operation in lieu of a policy of retrenchment, the former course having been prohibited by this court in its orders and opinions

filed on April 7, 1924, in Appeals Nos. 4195 and 4196 (Assignments of Error Nos. 2 and 3; Tr. pp. 68, 69).

Appellants assign as error the order of the District Court aforesaid for the reason that the purchase of the lands from said Lesher and the application by said Receiver of funds of the Union Land and Cattle Company in his hands as such Receiver to the payment of the purchase price thereof, constituted a withdrawal of said funds so paid from a fund available to appellants and the unsecured creditors of the Union Land and Cattle Company, and a converting of said funds into real property which will not be available to appellants and the unsecured creditors because said lands become subject to the lien of the bond mortgage dated September 1, 1916 (Assignment of Error No. 4; Tr. p. 69).

III. BRIEF OF THE ARGUMENT.

(1) It is error for a court to authorize the receiver of a private corporation to invest in land. Under the circumstances here shown, the order appealed from was clearly an abuse of discretion.

The Union Land and Cattle Company, as determined by this court in Appeals Nos. 4194, 4195 and 4196, is a *private corporation.** The business enterprise which it conducted—that of owning and operating sheep and cattle ranches in the States of Nevada and California—was

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*"The Cattle Company is a private corporation in every sense of the word, engaged in a private enterprise, and the magnitude of its holdings does not change its character or give it immunities not enjoyed by other debtors." Per Rudkin, J., in **297 Fed. 353.**

a private enterprise. The Cattle Company was not a public utility and was not at any time engaged in performing a public service but it was at all times engaged in carrying on an enterprise for the personal gain of its stockholders.

As pointed out by this court in Appeals Nos. 4195 and 4196, the duty of the receiver of a private corporation, and the duty of a court appointing such a receiver, is to wind up the affairs of the corporation as soon as may be, and as soon as the claims of the creditors of the corporation can be determined.

Kerr on Receivers, 5th Ed. p. 268;
Gardner v. London, Chatham and Dover Ry. Co., L. R. 2 Chancery App. 201.

We start, therefore, with the premise that the Union Land and Cattle Company is a private corporation, as distinguished from a corporation engaged in serving the public. If no further considerations existed and the question presented upon this appeal were solely as to the propriety of the District Court's authorizing its Receiver to expend $10,000 in purchasing land, it is submitted that the question should have to be answered in the negative, because of the rule that the receiver of a private corporation is under the law required to hold together the assets in his hands for the benefit of creditors *only* so long as it is necessary to determine who are the creditors entitled to share in the distribution, and is prohibited from making investments in the hope or upon the speculation that he can make money for the trust estate.

We shall present in categorical fashion the circumstances which exist in the present case which emphasize the invalidity of the order of the District Court appealed from and which establish, it is submitted, very definitely that the purchase of these lands by the Receiver constituted an invasion of the rights of the appellants and the other unsecured creditors of the Union Land and Cattle Company.

First.—The purchase of these lands and the investment of $10,000, plus interest thereon, by the Receiver were consummated, *not* at the inception of the receivership; they were consummated on August 4, 1924, after this receivership (a receivership over a private corporation performing no public functions whatever) had been operated by the District Court of Nevada through its Receiver for over four years; after such operation had been carried on for four years at an annual loss, which established definitely that even under the most economical management the receivership could not be operated except at a loss (Tr. p. 30); after unsecured creditors holding claims aggregating in their principal amounts over $3,000,000 had been without interest and without any payment whatever on their claims for over four years during which time, in the language of this court, "the processes of the courts against its (the Cattle Company's) property have been stayed"*; finally, after the Receiver and the District Court had been told by this court in its opinion in Appeals Nos. 4195 and 4196 rendered on April 7, 1924, to "make a sale of the prop-

*297 Fed. 353.

erty for the best price and on the best terms obtainable'' and that ''there should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes''. The order appealed from, therefore, and the purchase which it authorized, came not at or near the inception of the receivership (even at which time we contend they would have been clearly invalid), but at what was supposed to be and what this Court had ordered to be, the very end of the receivership; after all of the claims of all of the creditors of the Union Land and Cattle Company had been settled and approved and after the only duty of the District Court and its Receiver was to sell the property of the receivership estate and pay off as far as possible the creditors whose claims had been allowed.

Secondly.—The purchase was made and authorized after appellants, holding unsecured claims, the principal amounts of which aggregated $1,800,000, and the complainant in the action, holding a claim, the principal amount of which was $400,000, had *for over a year and a half* been insisting that the Receiver should sell the properties in his hands and apply the proceeds with whatever other cash was in his possession to the payment *pro tanto* of the claims of the creditors.

Thirdly.—The purchase was authorized and the order appealed from was made in the face of the directions given by this court to the District Court in its opinion of April 7, 1924, in Appeals Nos. 4195 and 4196.

Fourthly.—The order was made and the purchase of these lands was authorized notwithstanding that this

court had reversed the order of the District Court of November 2, 1923, and held that it was improper for the District Court to invest $110,000 in the purchase of additional livestock which the Receiver and his manager testified could be advantageously handled upon the ranges of the Cattle Company.

Fifthly.—The land which the court authorized its Receiver to purchase with an outlay of $10,000 is situated in a mountainous district of Nevada. It is not only admitted, but it has been asserted by the District Court and by the Receiver in the appeals which have heretofore been argued before this court in connection with this receivership, that it is a practical impossibility to sell livestock properties in the State of Nevada at the present time owing to depressed conditions in the market for such lands and in the live stock industry itself generally.

Sixthly.—Owing to the provisions contained in the deed of trust executed by the Union Land and Cattle Company to the First Federal Trust Company and Milton R. Clark under date of September 1, 1916, every acre of the lands so purchased falls immediately under the lien created by that instrument. Thus, every cent of money which the Receiver draws from the liquid assets of this corporation to pay for this land is taken irrevocably from appellants and the unsecured creditors and turned over to the bond-holders secured by the lien of the deed of trust.

We submit that under the most favorable conditions it is an extraordinary thing for a receiver of a private

corporation to invest money in real property, and this is true even though such investment be made at the inception of a receivership, that is to say, at a time when all parties to the liquidation are bound to assent to the proposition that the property of the debtor corporation shall be held in the possession of the court for a certain period into the future.

We submit, however, that when such a step is taken after four years have elapsed; after the receivership court has operated the property for four years at a loss; after all the claims of all the creditors have been approved and no further issues remain to be determined in the receivership action; after it has been adjudicated by a higher court that it is the duty of the receivership court to liquidate and sell forthwith; when the real property purchased is demonstrably unsalable; and, finally, when the moneys applied upon the purchase price must necessarily be taken irrevocably from one set of creditors and turned over to another set of creditors, such an order is indefensible.

(2) The order of August 4, 1924, authorizing the purchase of the Lesher lands and the payment of $10,000 plus interest, therefor, is in violation of the mandate of this court in Appeals Nos. 4195 and 4196.

This point has already been made as one of the contributing reasons why the order of the District Court was invalid, as an abuse of the District Court's discretion.

It is also to be urged as a separate ground for the invalidity of the order appealed from.

In the order of November 2, 1923, Judge Farrington had denied the petition of these appellants and of the First National Bank of San Francisco, the complainant in the action, for an order directing the Receiver to liquidate. Upon Appeal No. 4195 this court modified Judge Farrington's order and directed him to order his Receiver to liquidate the property

> "for the best price and on the best terms obtainable, and there should be no further delay trusting to or hoping for a change in conditions, or for speculative purposes".

In the order of November 2, 1923, Judge Farrington authorized his Receiver to expend $110,000 upon the purchase of additional livestock which the Receiver desired to use upon the ranges of the Cattle Company. Upon Appeal No. 4196 this court reversed the order, held that it was error for the District Court to make the authorization, saying:

> "The order authorizing the incurring of an indebtedness of $110,000, for the purchase of additional cattle and sheep, seems inconsistent with a policy of speedy liquidation. Such orders would have been justified in the earlier stages of the receivership but the time has arrived when there should be retrenchment instead of expansion."

It is submitted that the order authorizing the Receiver (within three months after the coming down of this court's mandates on Appeals Nos. 4195 and 4196) to invest $10,000 in land in a country where land is a drug on the market, is invalid as a flat violation of the mandates of this court in Appeals Nos. 4195 and 4196.

(3) **The order authorizing the purchase of the Lesher lands and the expenditure of $10,000 thereon by the Receiver is invalid as to appellants because it takes from them $10,000 and transmutes it into property which becomes subject to the lien of the bond mortgage.**

Under the deed of trust of September 1, 1916, executed by the Union Land and Cattle Company to the First Federal Trust Company and Milton R. Clark as Trustees, the lien of the trust deed is restricted to 224,000 acres of land owned by the Union Land and Cattle Company in the State of Nevada and to approximately two-thirds of the stock of the Antelope Valley Land and Cattle Company, one of the subsidiary corporations of the Cattle Company. The livestock and other personal property of the Cattle Company remain clear of this trust deed. *The trust deed, however, contains the usual clause rendering subject to its lien real property after acquired by the Cattle Company.* (See Tr. on Appeal, No. 4195, p. 289.)

It is apparent, therefore, that the $10,000, while it remained in the hands of the Receiver, constituted free assets of the Cattle Company and subject at the termination of the receivership to be applied in liquidating the indebtedness of appellants and of the other unsecured creditors of the Cattle Company.

The moment, however, that the $10,000 was taken by the Receiver and applied to the purchase of the Lesher lands, such lands became subject to the lien of the bond mortgage. The net result of the transaction, therefore, must necessarily be that by the purchase of these lands

$10,000 is withdrawn from appellants and the unsecured creditors of the Union Land and Cattle Company and is in fact turned over to the bond holders under the deed of trust.

(4) The points relied upon by the court and the Receiver in justification of the purchase are invalid.

We have already quoted the portion from the opinion of the District Court rendered on August 4, 1924, in which Judge Farrington states his reasons for making the order authorizing the purchase of the Lesher lands.

Three reasons are relied upon as supporting the propriety of the order:

(a) That the purchase of the Lesher lands is necessary as a protective measure in order to prevent the impairment of the range of the Spanish Ranch;

(b) That the property purchased is worth at least the price which was paid for it; and

(c) That $6,000 and interest had already been paid upon the purchase price and that the failure to pay the remaining $4,000 would work a forfeiture of the amount already paid:.

We shall show that none of these reasons separately, nor all of them together, constitute a sufficient defense to the making of this order.

(a) **The contention of the District Court and the Receiver that the purchase of the lands was essential to the protection of the Spanish Ranch is insufficient.**

Mr. Smith, the Receiver, Mr. Petrie, the Receiver's manager, and Mr. W. H. Moffat, one of the principal stockholders of the Union Land and Cattle Company, testified that the purchase of the Lesher lands was essential in order to protect the range land of the Spanish Ranch.

The Spanish Ranch, which is one of the five or six divisions of the properties of the Union Land and Cattle Company, consists of approximately 100,000 acres of land situated in Elko and Humboldt Counties in the State of Nevada. Mr. Smith testified that the land purchased from Mr. Lesher (which consisted of 1,800 acres of land but in fact only 1,200 acres of flat land) lay along the north side of Tuscarora Mountain "in the middle of our range that I have described as the I. L. and the Winters property"; that Mr. Calligan, the manager of the Spanish Ranch, had mentioned to him in the early part of the receivership that this land by reason of its location was desirable in order to protect the range of the Spanish Ranch; that he had tried to buy it from Mr. Lesher, but that Mr. Lesher had wanted $15,000 for it, which Mr. Smith thought was too much; finally, on June 23, 1922, Calligan made a contract with Mr. Lesher for the purchase of the land for $10,000, taking the contract in his own name in order to prevent the land from becoming subject to the lien of the bond mortgage. The

first payment of $1,000 was made on June 21, 1922, by Mr. Calligan and was later refunded by the Union Land and Cattle Company to Mr. Calligan, such refund appearing in the June, 1922, account of the Receiver *as rent*. The second payment was made by Mr. Calligan in December, 1922, and was refunded to him by Mr. Moffat, who was in turn reimbursed by the Union Land and Cattle Company, the item appearing in the September, 1923, account of the Receiver *as rent*. The third payment amounting to $4,241.33, was made by Mr. Smith in June, 1923, and on July 18, 1923, Mr. Smith reimbursed himself out of the funds of the Union Land and Cattle Company, the item appearing in his July, 1923, account. The final payment is the one which was mentioned in the petition upon the basis of which the order appealed from herein was made.

Mr. Smith took an assignment of the contract from Mr. Calligan in June, 1923, taking the assignment in his own name in order, as he said, to prevent the land from falling under the lien of the deed of trust, *an apparently futile proceeding inasmuch as it was admitted that Mr. Smith held the property as a trustee for the receivership estate.*

The extent to which the purchase of the 1,200 acres of Lesher land was necessary to the maintenance of the range of the Spanish Ranch can be measured from Mr. Smith's own testimony and from certain admitted facts.

Mr. Smith testified that he feared that Mr. John G. Taylor, who owned land in the vicinity, might run cattle

over the range of the Spanish Ranch unless the lands in question were purchased as a barrier. He acknowledged, however, that he had never had any difficulty with Mr. Taylor and that Mr. Taylor had never run his cattle over the lands of the Spanish Ranch belonging to the Union Land and Cattle Company during the period of the receivership. Nor had anyone else. Mr. Smith testified as follows:

> "From the time I have been familiar with the property as Receiver up to the present time, I have had no difficulty whatever on account of that Lesher property from trespassers or otherwise." (Tr. pp. 44-45.)

So far as appears no such difficulty had ever been encountered by the Union Land and Cattle Company during the many years of its ownership of the Spanish Ranch. So far as appears those who were instrumental in assembling the properties going to make up the Spanish Ranch did not see fit to purchase the Lesher property, and throughout the many years that have intervened during which the Spanish Ranch has been operated, it has never been the actual cause of trouble. It is only after these properties have been in the hands of a Receiver for four years and are about to be sold upon the auction block that the supposed imperative necessity for the acquisition of the Lesher lands has become apparent.

Finally, in measuring the propriety of the action of the Receiver in acquiring at this time these 1,200 acres of land in order to fill out the range of the Spanish

Ranch, it is to be borne in mind that the Spanish Ranch, of all the divisions of the Union Land and Cattle Company, is with one possible exception the one which has been proven the most unprofitable.

Mr. Smith, himself, says:

> "We have operated the Spanish Ranch for pretty nearly four years and it has never paid its way." (Tr. p. 44.)

If, therefore, it was proper at this time for the Receiver of the Union Land and Cattle Company to take from the appellants and the other unsecured creditors of the Union Land and Cattle Company against their protest, $10,000 of free assets and apply it in the purchase of these 1,200 acres of land for the supposed protection of a portion of the range of the Spanish Ranch, by the same line of reasoning it can be held to be within the discretion of the District Court to purchase innumerable other sections of land which might be said to be protective or otherwise valuable to other of the more profitable divisions of the Union Land and Cattle Company.

(b) The contentions of the District Court and of the Receiver that the lands are worth at least the price paid for them.

It needs no argument to demonstrate that this point, even though true, would afford no justification for the order made. Even though it appeared that the lands might possibly be sold for more than was paid for them, the Receiver should not have been authorized to buy

them. Speculation in real estate is more to be condemned than speculation in livestock, and the latter course was definitely disapproved of by this court in its opinion of April 7, 1924, on Appeal No. 4196. The record, however, shows very definitely that the lands purchased are not worth the price paid for them.

Mr. Smith testified that he could not tell whether he could sell the lands for $3.00 an acre—in fact, he said that he doubted whether he could obtain such a price (Tr. p. 44). The purchase price was $10,000, which would be on the basis of in excess of $8.00 per acre, if the tract contained 1,200 acres, or on the basis of over $5.00 an acre if it be assumed that the tract contain 1,800 acres.

Mr. Petrie testified that he thought that the price was reasonable, but it is apparent that his opinion was based upon the fact that he thought its purchase was essential for the protection of the range of the Spanish Ranch (Tr. pp. 48-50).

Mr. Moffat testified that he thought it could be sold; that he thought that if the Company wanted to dispose of it he could find a party who would buy it for what it had cost the Company (Tr. p. 51). If this testimony be taken as serious testimony to the effect that $5.00 or $8.00 per acre can be obtained for the lands, it is opposed by the experience of the past four years, the known conditions now existing in Nevada with respect to the sale of livestock lands, and by the character of the lands themselves. The only property which the Receiver has been able to sell in Nevada after four and a

half years is the H. C. Ranch which has been sold upon the basis of $3. per acre. The Spanish Ranch is of all the divisions of the Union Land and Cattle Company properties the least productive and the Receiver has not been able to obtain an offer of any kind for it. This particular land is in one of the most inaccessible parts of the Spanish Ranch.

We submit that the argument as to the value of the lands purchased is in the first place of no avail; secondly, that it has no foundation in fact.

(c) The argument of the District Court and the Receiver that failure to approve the purchase would result in the loss of the amounts already paid.

The petition upon which was based the order of August 4, 1924, with reference to the purchase of these Lesher lands, was filed on May 26, 1924. This was the first time in the history of the receivership that the Receiver presented to the court an application upon notice to appellants and to the creditors for an order authorizing the purchase of these lands. This was so notwithstanding that it was the uniform practice of the Receiver as to matters of the slightest import to apply to the court for directions and authority and to give the creditors an opportunity to be heard in connection with them.

The contract to purchase under which the lands were acquired was entered into as above stated on June 23, 1922, between Lesher, the seller, and George H. Calligan, the manager of the Spanish Ranch. The payment of

$1,000 due on January 23, 1922, and the payment due under the contract on December 1, 1922, were made by Calligan and he was later reimbursed by the Receiver. These two items of reimbursements appear in the Receiver's accounts for June, 1922, and September, 1923, *as items of rent,* no mention being made whatever of the fact that a contract had been made for the purchase of the lands. The first intimation to appellants or the creditors of the contract of purchase came when the Receiver's account for July, 1923, was filed. In June, 1923, Mr. Smith, the Receiver, took the assignment of the contract from Calligan, made the payment of $4,241.33 due under the contract on June 21, 1923, and, having reimbursed himself from funds of the Union Land and Cattle Company in his hands as receiver, entered that item in his July, 1923, account.

The account for July, 1923, was not heard until January 12, 1924. At that time these appellants objected to the allowance of this item upon the ground that there had been no prior application to the District Court, with notice to appellants, for an order authorizing the Receiver to make the purchase of the lands. These objections were argued and submitted to the District Court on January 12, 1924, and on May 26, 1924, they were decided by the District Court, Judge Farrington sustaining the objections upon the ground upon which they had been urged by these appellants. Thereupon the Receiver filed the petition upon the basis of which the order appealed from was made.

Mr. Smith gives the following reasons for not having followed the usual procedure; for not having applied to

the court for authority in connection with the contract for the purchase of these lands until more than two years after the contract itself had been entered into and until the sum of $6,000 had been paid out on account of the purchase price, *$2,000 of it having been returned as rent in his accounts:*

> "The reason why the usual procedure wasn't followed by filing a petition and having a hearing, advising the creditors of the proposals when the $4,000, plus interest, was paid on account of the contract, was as I told you. I talked to Judge Farrington himself in his chambers and he told me he wasn't familar with the land and that I would have to use my best judgment; so I went up there to get Mr. Calligan and Mr. Calligan wasn't in condition to see me or do business and I couldn't meet him and the contract matured and unless it was paid on the date it was due, what had been paid already would have been forfeited and Mr. Lesher would have still owned the property. Afterwards, Mr. Calligan went to Elko and conveyed the property, his right, to me. I took it in my name, as I told you, to keep it from being complicated with the mortgage in San Francisco. In other similar transactions involving purchases, certainly in the channels of capital expenditure, I have made it a customary procedure to file petitions and to advise the creditors and to have a hearing with reference to such purchase. These accounts, as fast as they came, were put into Court in the usual way and the judge did not pass upon them until the time when you know, when the objections were made. They were six months behind, were not passed upon."

Under the foregoing circumstances, we submit that the Receiver is in no position to urge the fact that he made the first three payments without authority as a ground for obtaining the District Court's approval of

the transaction. The consequences to appellants of his action are that they together with the other unsecured creditors of the Union Land and Cattle Company will simply lose $10,000 if the order appealed from is allowed to stand.

It is respectfully submitted that the order appealed from should be reversed.

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Dated, January 26, 1925.

NO. 4410

In the United States
Circuit Court of Appeals
For the Ninth Circuit

OLD COLONY TRUST COMPANY, a corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

VS.

UNION LAND & CATTLE COMPANY, a corporation, and W. T. SMITH, Receiver of said Union Land & Cattle Company, Under and By Virtue of that Certain Order Given and made by the District Court for the District of Nevada, on July 28, 1920, SILVERIA GARAT, W. T. HITT, EMMA McLAUGHLIN, HENRIETTA MOFFAT, MAUD B. CLEMONS, FRANCES C. RICKEY, W. A. DILL, W. H. FRAZER, ELIZABETH SHARP, MRS. ALOYSIUS DAVEY, and J. W. DORSEY,

Appellees.

Brief for Appellees

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TABLE OF CONTENTS

	Pages
STATEMENT OF CASE	1-4
REASONS FOR PURCHASE	4-6
OUTLINE OF ARGUMENT	6-7
BRIEF OF ARGUMENT	7-23

1. Contract for purchase was proper in and of itself. It was made at a time when the property was operated as going concern, with approval of all creditors.

2. Purchase of property was necessary because of the key position it occupied with reference to Spanish Ranch.

3. Payments aggregating $6,000.00 out of purchase price of $10,000.00 had already been made.

4. Orders of District Court were within its discretion. That discretion was properly exercised.

5. Issue here is whether there was an abuse of discretion.

6. If discretion of District Court was not abused, orders should be affirmed.

REPLY TO APPELLANTS' BRIEF	23-31

TABLE OF CASES

	Page
American Grain Co. vs. Twin City Co., 202 Fed. 202	16
1 Corpus Juris, 372	17
4 Corpus Juris, 796	18
Gay vs. Hudson River E. P. Co., 173 Fed. 1003	18
Root vs. Bingham, 128 N. W. 132	18
Stokes vs. Williams, 226 Fed. 148	15
Stuart vs. Boulware, 133 U. S. 78	17
Trustees vs. Greenough, 105 U. S. 527	17
Tardy's Smith on Receivers, Page 2174-2177	14-15
Wilson & Co. vs. Bent Incorporated, 300 Fed. 484	17

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OLD COLONY TRUST COMPANY, a corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

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Appellees.

Brief for Appellees

STATEMENT OF FACTS

The Spanish Ranch comprises one of the principal divisions, or units, of the property of the Union Land & Cattle Company. It consists of thousands of acres

of land, and attached to it have been very large herds of cattle and flocks of sheep. The Union Land & Cattle Company is a great livestock concern. It is engaged exclusively and very extensively in raising and growing sheep and cattle for the market, and its far-flung possessions extend over the states of California and Nevada. In order to properly graze its livestock, it owns ranches in various parts of these states, which are used as bases, or central stations, for the care of the sheep and cattle, and which are also used as very important and essential strategical positions from which the public domain is utilized as feeding grounds.

We think the court is entitled to avail itself of its general knowledge of the manner and methods by which the livestock business is conducted at the present time in the public land states of the West. Sheep and cattle are grazed over an immense area, miles in extent, and only at fixed periods of the year are they brought to the central ranches. The grazing lands are the property of the United States, while the ranches themselves are important and valuable, in a large measure, on account of their relation to, and their control of, the adjacent public grazing land. The sheep and cattle are not and cannot be kept on the ranches themselves, except during the time when they are fed for the market, nor can they be confined to the ranch properties.

This condition has resulted in the location of ranch properties at convenient points to the grazing lands, and in connection with a water supply.

The Lesher ranch, the purchase of which is involved in this appeal, is merely illustrative of such a condition. It is not peculiar to the property of the Union Land & Cattle Company, nor is it in any sense an exceptional undertaking.

The Lesher ranch is located in the middle or heart of the range used in connection with the Spanish Ranch. It consists of approximately 1280 acres, and the range in relation to which it was located was the only valuable range which was left for, or available to, the Spanish Ranch property. So, **in June, 1922,** a contract was made for the purchase of this property, for the benefit of the Union Land & Cattle Company. The contract provided, generally speaking, for the purchase price of $10,000, which sum was payable as follows:

$1,000.00 on June 23, 1922;
$1,000.00 on December 1, 1922;
$4,000.00 on June 21, 1923; and
$4,000.00 on June 21, 1924,

deferred payments to bear interest at the rate of six (6%) per cent per annum. It provided, further, for the forfeiture of the contract, if the payments were not made at the dates specified, and, also, for a for-

feiture of all payments made prior to a default. Upon the making of the contract, possession was taken of the ranch, and it has been used ever since by the Receiver in the operation of the property. Payments were made at the dates specified in the contract, and $6,000.00 had been paid on the purchase price of the ranch by June 21, 1923, without any apparent objection from any source.

REASON FOR PURCHASE

The evidence before the District Court seems to us to disclose very persuasive reasons for the purchase of this property. They are:

First. The contract for the purchase was made at a time when the Receiver, with the full concurrence of all the creditors, including those now objecting, was operating the property as a going concern, under the original order of his appointment, and before an active policy of liquidation was inaugurated, following the failure of the Creditors' Agreement in 1923;

Second. The purchase was made as a measure necessary for the protection of the entire Spanish Ranch.

Third. The property was so located and occupied such a position with reference to the range lands,

that, if it fell into other hands, the whole range for the sheep and cattle of the Spanish Ranch might have been seriously endangered;

Fourth. Livestock interests, other than the Union Land & Cattle Company, and competitive with the Union Land & Cattle Company for the use of the range, would have secured access through the purchase of this property to the heart of the Spanish Ranch range, "which was nearly the only valuable range by itself wich the Spanish Ranch had left."

Fifth. The purchase price for the property, in and of itself, was reasonable, aside from its key position.

In addition to these matters, the court must bear in mind the fact that the failure to make the payment of $4,000.00, on he 23d of June, 1924, would have meant the loss to the receivership of the ranch itself and the $6,000.00 theretofore paid, because the evidence showed that, in all probability, the Lesher property could at any time be sold for the full amount of the purchase price.

The Receiver filed his petition for authority to make the last payment of $4,000.00, due under the contract, and for an order approving the payments theretofore made under the contract. Notice of the hearing of these petitions was served upon all the

creditors and all other parties in interest. A hearing was held at the time fixed in the notice, and the District Court after full hearing, made an order:

1st. Directing the payment of the amount still due under the contract; and

2nd. Confirming and approving the payments which had already been made.

No objection was made to the order of the District Court, except by the group of seven Eastern banks —neither the First National Bank of San Francisco, nor the First Federal Trust Company objected—a group which has appeared in all the other proceedings before this court. The appeal to this court from the order of authorization and approval is prosecuted by this group of seven Eastern banks.

OUTLINE OF ARGUMENT

1. The contract for the purchase of the Lesher property was a proper contract in and of itself, and it was made at a time when the property was operated as a going concern by the Receiver, with the full concurrence and approval of all the creditors, including those now objecting.

2 The purchase of the property was necessary and proper, not only on account of the property it-

self, but because of the key position it occupied with regard to the control of the range used in connection with the Spanish Ranch.

3. Payments aggregating $6,000.00 had been made by the Receiver, without objection, these payments appearing in his accounts, which had been approved by the court after notice to the creditors.

4. The orders made by Judge Farrington were within his jurisdiction to make. They were made pursuant to a sound discretion vested in him. That discretion was properly exercised.

5. The inquiry of this court should be confined to the determination of the question whether, under the circumstances of this case, the discretion of the District Court had been abused.

6. There is no abuse of discretion here, and the orders should be affirmed.

BRIEF OF ARGUMENT

It seems to us that little need be added to what has already been set forth in the statement of facts. The testimony to which we desire the court to refer does not leave the propriety or wisdom of these orders in doubt. It establishes beyond dispute the wise character of the contract, and the necessity of

the purchase.

Mr. Smith, the Receiver, testified in substance as follows:

"This Lesher matter was brought to my attention by the foreman, Mr. Calligan, soon after I became Receiver of the Union Land & Cattle Company. * * * * It is on the north side of Tuscarora Mountain, in the middle of our range. * * * Mr. Calligan brought this matter to my attention in the beginning. * * * I thought it was important for the Union Land & Cattle Company, or the Spanish Ranch division, to purchase this land from Mr. Lesher. A holding like this, in the heart of our range would be very injurious to the Union Land & Cattle Company, and would permit Mr. Taylor, if he should buy it, to get a holding there that would, in a way, give them access for their cattle and sheep to the heart of this range, **which was really the only valuable range by itself that we had left.** * * * We felt it was vitally important that we should acquire possession of this in some way, to prevent anyone else from getting in there.

"Q. Your judgment it was necessary to hold that land as a protection to the range of the Spanish Ranch?

"A. It was.

"Q. And if it was secured by John G. Taylor, or any other large livestock owner, likely to range his own cattle or sheep on this land, or to get access to this tract of land, it would seri-

ously impair the value of your range and your livestock?

"A. It would.

"Q. It was that the land should not go into the possession of anyone else who own sheep or cattle?

"A. Yes. That is the most valuable range land in one body that belongs to the Spanish Ranch division, and to have some other man acquire that holding in there would be very detrimental to the interest of the Spanish Ranch division.

"Q. Mr. Smith, do you regard the fulfillment of that contract as a necessary thing for the estate?

"A. I do."

The record also contains the testimony of Mr. Petrie, a livestock man of long, varied and very successful experience in the management of similar properties. Mr. Petrie says, concerning this purchase:

"Q. What would you say as to the advisability of that purchase, (the Lesher property) from your knowledge of the location of the Lesher land?

"A. I think the purchase was quite essential at the time, and the price paid was very reason

able for the grass and the security obtained.

"Q. You think the purchase of the land was advisable to preserve the range of the Spanish Ranch division?

"A. No question about it in my mind.

"Q. You think it should have been made?

"A. Absolutely.

"Q. And that the price paid was reasonable?

"A. I think so."

Mr. Petrie says further that the land was worth the purchase price for protection to the rest of the range.

And, explaining more in detail his reasons, he says:

"We will assume any stockman, having both sheep and cattle, or either sheep or cattle, located in that locality, would get a foothold and headquarters on this particular 1280 acres, he could use the adjoining range for a great many head of livestock that are now under our control, on account of having this property; and, in addition to that, it would help close up the gap from the west, that is, the entrance from the west into the main range on Tuscarora Mountain, from any tramp bands of sheep encroaching, not only on this land, but on land for several miles

through there; it would be a great protection in that particular, because there are two miles of fence that practically closed out bands from the west. It would also help to head out a great many range horses and wild horses that assembled throughout that country that eat a great deal of the feed that the cattle company has on this range.

"Q. That would be particularly bad at this time, in a season of shortage of feed?

"A. That is quite true, but it is very valuable at any time, no matter what the season."

And in answer to counsel on cross-examination, Mr. Petrie says:

"Q. If you were the owner of the Spanish Ranch without that property, the Lesher property included within it, and were in a position where you had to sell it between two and four months from today, would you recommend, as a matter of business operating policy, purchasing the Lesher property at $10,000.00?

"A. Yes, sir. I would. I would like to bring that in my statement before, I overlooked it.

"Q. In other words, you think the purchase price of the property, the value of the property, would be enhanced?

"A. It has more than $10,000.00 value. I mean to bring that in; I think it adds more than the purchase price to the whole value of the property."

Furthermore, the Lesher contract met with the entire approval of Mr. Moffat, the President of the Union Land & Cattle Company, and whose knowledge of the company's affairs and business was more intimate than that of any other person. Mr. Moffat says:

> "I think the purchase of the Lesher property was advisable. It was a benefit to the Spanish division, because it is the key to that particular part of the range, and, on account of its location, it protects the range of the Spanish division."

Another significant feature of Mr. Moffat's testimony is his opinion as to the reasonableness of the price and the value of the land on re-sale. He says:

> "Q. What would you say as to its value now, Mr. Moffat?
>
> "A. Well, I suppose it ought to be worth the same now as then.
>
> "Q. You think it could be sold?
>
> "A. I think so.
>
> "Q. Have you any reason to base that opinion on?
>
> "A. I think if the company wants to dispose of it, I could find a party who would buy it at what it cost the company."

This was the testimony which was before the

United States District Court at the time it made the orders complained of, and we are thus brought to a consideration of the law which governs and controls in such a situation.

We do not believe it can be seriously urged that the District Court was without jurisdiction to proceed as it did, and it seems clear that the making or withholding of such orders was within the discretion of the court charged with the responsibility of this receivership. As to this, we deem a citation of authorities to be wholly unnecessary. If this premise be correct, then the inquiry should be limited to a consideration of the function of this Court, and the rules which govern it in the exercise of its appellate jurisdiction in the instant case. The rule is well established that this Court will not undertake to substitute its judgment for the judgment of the District Court, or undertake to decide whether the Lesher purchase was, or was not, good business, but it will only determine whether, in making the orders complained of, the United States District Court abused its discretion.

The process of reasoning, by which this conclusion is reached ,seems logical and consistent. The District Court had jurisdiction to make the orders. In making them, it necessarily exercised judicial discretion, and was within its rights in so doing,—unless such discretion was abused. So that, the question before

this court is: Did the District Court abuse its discretion?

LIMITS OF APPELLATE JURISDICTION IN SUCH CASES.

The authorities, so far as we have examined them, are practically uniform.

Mr. Tardy, in his edition of Smith on Receivers, says:

> "Where the order appealed from is one within the discretion of the court, it is not subject to review unless the court has abused its discretion. This rule is frequently applied in the case of conflicting evidence.
>
> "Interlocutory orders appointing receivers and issuing injunctions generally rest in the sound judicial discretion of the court of original jurisdiction guided by the principles and rules of equity jurisprudence and when the court has not departed therefrom its orders may not be reversed without clear proof of an abuse of its discretion.
>
> "Orders of the court made in the course of the administration, such as orders authorizing the compromise of claims of the receivership, giving the receiver instructions in respect to the receivership or refusing to punish for contempt one who violates its orders are all of such a discretionary character as not to be reviewable except in the case of a clear abuse of judicial discretion.

"An appellate court in reviewing the discretion of a trial court in approving or rejecting an offer or purchase of the receivership property applies the same general principles as in the review of an order refusing or granting a temporary injunction. The right to exercise a sound discretion is in the trial court and not in the appellate court."

Vol. II, Tardy's Smith on Receivers, Second Edition, 1819, Pages 2174, 2174, 2177.

The Circuit Court of Appeals for the Third Circuit, in **Stokes vs. Williams**, 226 Fed. 148, 156, says:

"But the acceptance or rejection of the offer, and the making or withholding an order of sale, were matters wholly within the discretion of the court. Being matters within the discretion of the court, the question on appeal is not whether this court would have made the same order, but whether the District Court, in making the order, abused its discretion. In treating this question, we conceive we are controlled by the same principle that applies in a case where an appellate court is asked to review and reverse the judgment of a trial court in granting or refusing a temporary injunction. In both instances, the right to exercise a sound judicial discretion is vested in the trial court, and not in the appellate court. It is to the discretion of the trial court and not to the appellate court, that the law has intrusted the power in one instance to order a sale as in the other to grant or dissolve an injunction, and the only question for an appellate court is. Does the proof clearly establish an abuse of that discretion by the trial court?"

The Circuit Court of Appeals for the Eighth Circuit, in **American Grain Separator Co.** vs **Twin City Separator Co.**, 202 Fed., 202, at Page 206, says:

> "The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion.
>
> The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? Fireball Gas Tank & Illuminating Co. v. Commercial Acetlyene Co. (C. C. A.) 198 Fed. 650, 653; Massie v. Buck, 128 Fed, 27, 31, 62 C. C. A. 535, 539; Love v. Atchison T. & S. F. Ry. Co. 185 Fed. 321, 330, 107 C. C. A. 403; High on Injunctions (4th Ed.) Sec. 1696; Higginson v. Chicago, B. & Q. R. R. Co., 102 Fed. 197, 199, 42 C. C. A. 254, 256; Interurban Ry. & Terminal Co. v. Westinghouse E. & Mfg. Co. 186 Fed. 166, 170, 108 C. C. A. 198, 302; Kerr v. City of New Orleans, 61 C. C. A. 450, 454, 126 Fed. 920, 924; Thompson v. Nelson, 18 C. C. A. 137, 138, 71 Fed. 339, 340; Societe Anonyme Du Filtre Chamberland Sys. Pasteur v. Allen, 33 C. C. A. 282, 285, 90 Fed. 815, 818; Murray v. Bender, 48 C. C. A. 555, 559, 109 Fed. 585, 589; U. S. Gramophone Co. v. Seaman, 51 C. C. A. 419, 423, 113 Fed. 745, 749."

And the same rule was but recently announced by this Court in the case of **Wilson & Co.** vs. **The Best Foods Incorporated**, 300 Fed. 484, 486.

This order, being within the discretion of the court, stands upon the same footing as other orders that are discretionary, and they will not be disturbed on appeal, except for an abuse of such discretion.

> **Stuart** vs. **Boulware**, 133 U. S. 78, 36 Fed. 568;
> **Trustees** vs. **Greenough**, 105 U. S. 527, 537.

These authorities might be multiplied indefinitely, but the question here is: Was there an abuse of discretion, which brings us to the further inquiry.

WHAT IS AN ABUSE OF DISCRETION?

Your attention is respectfully invited to the following definition of this rather vague and intangible expression:

> "A discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence; a clearly erroneous conclusion and judgment—one that is clearly against the logic and effect of such facts are are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an error of judicial discretion; a use of discretion contrary to established usage.
>
> 1 **Corpus Juris**, 372, 373.

It seems to us that the definition to be applied here is that found in **Root** vs. **Bingham,** 128 N. W. 132, where it is held that judicial discretion is abused only when it may be said that it is exercised **on grounds for reasons clearly untenable, or to an extent clearly unreasonable.**

The matter here presented for consideration is not that the judgment of the District Court was mistaken, nor that the conclusion reached was wrong. It is not ,even, that this court might, under the circumstances of the case, have arrived at a different result, or made a different order. These factors are entirely aside from the issue. We are interested in determining whether the order of Judge Farrington **was clearly untenable and carried to an extent that was clearly unreasonable.** Unless this court can so hold, the appeal cannot be maintained.

It has been said in such a contingency:

> "It should be a very marked breach of discretion to justify our interference."
>
> **Gay vs. Hudson River E. P. Co.,** 173 Fed.
>
> "It is a universally recognized rule that, in the absence of a clear abuse of discretion, operating to the complaining party's prejudice, matters within the discretion of the trial court are not reviewable on appeal."
>
> 4 **Corpus Juris,** Sec. 2753, P. 796.

If this be the true rule, as we contend it is, how can it be held that the order here complained of was an abuse of the discretion of the District Court?

A. The land was deemed necessary for the protection of the range tributary to the Spanish Ranch.

B. Its purchase was sought by a competitive company, whose purpose was to use it as a base from which to invade the range then being used by the livestock of the Union Land & Cattle Company.

C. It was the last range which the Spanish Ranch had.

D. The Lesher land lay right in the heart of the Spanish Ranch property. It was necessary and useful for the operation of that ranch.

E. The land was worth the price paid for it.

F. It can be sold for that price now.

G. Had the $4,000.00 not been paid, it would have meant the loss of the $6,000.00 which had already been paid for it; this loss would have been absolute.

There was no abuse of discretion, under these cir-

cumstances, in ordering the payment to be made. We think further argument is unnecessary and would be an imposition upon this court.

The sole question which remains to be considered is whether the policy of liquidation introduced a factor into this transaction which made the purchase improper to a degree which amounted to an abuse of discretion. We think not.

The property of the Union Land & Cattle Company was operated as a going concern by the Receiver at the request, and with the full concurrence, of the creditors from the time of the Receiver's appointment, on July 28, 1920, to and until the 23d day of May, 1923. On this date, the first objection was made by one creditor, in the form of a petition by the First Federal Trust Company for an order for the delivery to it of all the lands embraced in its mortgage. This was the first notice of any objection by any creditor to the continued operation of the company's business by the Receiver.

The Lesher property had been leased by the Receiver and used by the Receiver under the lease prior to the contract of purchase, but it must be kept in mind that this contract was executed **on June 23, 1922.**

The property had been found to be useful and

valuable by the Receiver, and, at the time objection was made to the purchase, approximately $6,000.00 had been paid upon the total purchase price of $10,000.00. Stated in another way, and from the view-point of these objecting creditors, Judge Farrington was asked to refuse the Receiver permission to complete his contract, which would immediately have resulted in forfeiting:

A. 1280 acres of land;

B. $6,000.00 theretofore paid upon the land;

C. Protection to the range of the entire Spanish Ranch Division, at a time of an acute shortage of feed;

D. The use of the ranch as a base for the utilization of the range lands;

E. It would have resulted, also, in the additional shortening of the available feed supply for the cattle of the Spanish Ranch.

F. That key position would have passed into the hands of competitive interests, who would immediately utilize it for the grazing of their own livestock,—all to effect a nominal saving of $4,000.00.

It seems to us that, had Judge Farrington acceded to the demands of this particular group of creditors, such action could have been viewed only as a clear abuse of discretion, contrary to the interest of every

creditor, and detrimental to the receivership estate.

There are two considerations which seem to us to be decisive of this entire controversy:

1. The Lesher property itself, according to the testimony which we have quoted, is intrinsically worth the entire amount paid for it, and can at any time be sold for that sum, independently of the Spanish Ranch itself.

Under these circumstances, it would have been an act of folly to have relinquished the ranch when sixty per cent of the purchase price had already been paid.

2. The Lesher property, in addition to its intrinsic worth, occupies a key position with reference to the only valuable range land used in connection with the Spanish Ranch.

One of the most obvious factors in the sale value of the Spanish Ranch, or any other ranch property, is the condition, size, character and availability of the range which is tributary to such ranch. This is one of the first inquiries which any prospective purchaser will make. The value of the ranch itself is dependent upon the range which may be used in connection therewith. It seems inevitably to follow that, if a certain piece of property occupies an im-

portant key position with regard to the operation of a ranch, it occupies the same key position with regard to the sale of the ranch.

The purchase of the Lesher Ranch is as essential to the sale value of the Spanish Ranch Division, as it has been to the operating value of that property. The policy of liquidation did not introduce any new element into this situation, which affected the propriety of the Lesher purchase.

REPLY TO BRIEF FOR APPELLANTS.

..The entire argument for the appellants may be reduced to the following propositions, neither of which is tenable.. It is claimed:

FIRST: That the order of Judge Farrington should be overruled, because it contravenes the mandate of this court in the former appeals.

It is not clear from counsel's discussion of this proposition what mandate, or what portion of any mandate, was violated by the order to complete the purchase of the Lesher ranch, but it may be assumed that reference is made to the policy of liquidation ordered by this court, and that the expenditure here involved is in some way inconsistent with that policy.

The answer to this contention is given by the facts

concerning the purchase, and the reasons which induced it.

The contract was made **prior** to the failure of the creditors' agreement for re-organization, and at a time when the property was operated as a going concern, with the consent of all the creditors.

But, even more important than this, the purchase of this property was made for the protection of the range upon which the Spanish Ranch was dependent, and was merely a measure of insurance. The Receiver and the District Court believed that, if this ranch fell into the hands of certain competitive interests, the Spanish Ranch would suffer, its sale value would be endangered, and the equity of the creditors in that property would be impaired. The situation before the District Court may be illustrated by the testimony submitted to Judge Farrington on this very point. Mr. Petrie testified as follows:

> "If I were the owner of the Spanish Ranch, without that property, the Lesher property included within it, and were in a position where I had to sell it between two and four months from today, I would recommend, as a matter of business operating policy, purchasing the Lesher property at $10,000. I would like to bring that in my statement before; I overlooked it. The property has more than $10,000 value. I meant to bring that in; I think it adds more

than the purchase price to the whole value of the property."

Pages 49, 50 and 51 Transcript of Record, upon appeal from the U. S. District Court for the District of Nevada.

And there was no testimony to the contrary. Every witness agreed to this.

It seems to us that such a purchase was just as necessary to preserve the Spanish Ranch range, and, therefore, the sale value of the Spanish Ranch itself, as policies of insurance would be necessary, even during a period of liquidation, to protect the buildings on the property of the Union Land & Cattle Company. It was not a matter of speculation, but a question of preservation, and, certainly, it could not be held to be an abuse of discretion to secure this protection.

This court, in the former appeals, enjoined a policy of retrenchment, as distinguished from a policy of expansion, but it did not directly or indirectly suggest that the Receiver, or the District Court, should neglect obvious measures of protection to the estate in their care.

Nor did this court ever interpose its objection to the performance of contracts for the benefit of the estate which had been made prior to any disagree-

ment among the creditors. If the contention of counsel be now carried to its logical conclusion, it would seem that the opinion of this court favoring a policy of liquidation, required the Receiver to immediately abrogate and cancel every contract which had theretofore been made, and, certainly, this court had no such intention, and gave no such direction. It is significant that, up to the time of the last payment of the purchase price of the property, although they then had knowledge of the facts, the only objection which was made by these seven creditors was that the Receiver had not filed a formal petition in the District Court. As counsel say, at Page 8 of their brief:

> "The July, 1923, Account was not heard until February, 1924, at which time, upon the objection of these appellants, the court refused to allow the item, because no formal application for authorization of the Receiver to purchase the Lesher property had been made."

These very creditors had received the benefits of the Lesher Ranch purchase ever since 1922. It had been used to protect the grazing of 4,000 or 4,500 cattle, a measure immediately for the especial benefit of the creditors, and it seems to us to come with ill grace to now object to such a purchase, after receiving all the benefits it could offer.

It is impossible to scrutinize the records in this

court without coming to the inevitable conclusion that these seven creditors, a minority in number and amount, have, at every turn, and in every way in their power, sought to embarrass this receivership, and have impeded its work, and frustrated its purposes, in order to impose their will upon it. These are the only objecting creditors, and never from the beginning have they offered a single constructive suggestion, nor given helpful cooperation in working out the problems of the receivership.

SECOND: The order of the District Court, it is contended, should be reversed because the land purchased became subject to the lien of the deed of trust, and was, therefore, withdrawn from the assets available for the general creditors.

This objection does not present the whole case. It ignores the basic factor that the general creditors are vitally interested in the sale value of the Spanish Ranch, as much so, in fact, as the holders of the bonds. The mortgaged indebtedness has been reduced from $1,200,000.00 to $720,000.00 and the value of the equity of the unsecured creditors in these lands has been proportionately increased. The impairment of the range tributary to the Spanish ranch, by reducing the sale value of that property, would likewise reduce the value of the creditors' equity in the lands, and, therefore, the purchase of the Lesher

Ranch, if the reasons inducing it were justified, was directly for the benefit of the general or unsecured creditors. If these lands which were purchased appreciated the value of the Spanish Ranch, they likewise increased the value of the creditors' equity in that property.

But, aside from this, the fact remains that large herds of cattle, which were assets directly applicable to the discharge of the unsecured creditors' claims, were grazed, fattened, prepared for market, and cared for on these lands, and on the range tributary to them, and it was solely for the benefit of these cattle, which were the assets of the unsecured creditors, that the lands were purchased. In the light of these facts, it seems unimportant whether or not the Lesher Ranch became impressed with the lien of the deed of trust.

There are certain statements contained in the brief for Appellants which are so easily susceptible to misunderstanding and which are so likely to mislead the court, that we think reference must be made to them.

It is stated that the receivership has been conducted at a loss. This statement has been so frequently made that further denial ought to be unnecessary. The Receivership has not been conducted at a loss. On the contrary, it has not only paid its

own way, but the principal indebtedness has been constantly reduced. What counsel meant, and what they should in frankness have stated to the court, if they did not desire to mislead it, was that no interest has been paid on the unsecured indebtedness, but the Receiver has paid approximately $650,000.00, or more, in principal and interest on the secured indebtedness, and there has not been any increase whatever in the principal indebtedness of the company.

Counsel further state that it has been impossible to sell the lands, or any of them, of the Union Land & Cattle Company. The facts are that the "H. C." Division has been sold, and in addition to this, the Ione Ranch has also been sold for $505,000.00 and the Receiver has under consideration inquiries for the sale of the Spanish Ranch.

Counsel also refer to "the Nevada creditors." The purpose of this reference is entirely obvious, the idea evidently being to convey to this court an impression that efforts are being made to conserve the interests of "the Nevada creditors." The facts are that there are practically no Nevada creditors but that approximately sixty per cent, or more, of what counsel term "the Nevada creditors," are either residents of California or states other than Nevada.

Counsel have so frequently and steadily made statements of the nature of those above mentioned,

in spite of the facts, that we take this occasion again to put the facts before this court.

In conclusion, we cannot do better than to again refer to the reasons which induced the District Court to authorize the completion of the purchase of this ranch.

Judge Farrington says:

> "The purchase of the Lesher land does not at first view seem like liquidation, but on careful consideration it appears to me that its acquisition is not only vital, but that it will facilitate rather than delay sale of the Spanish Ranch. In itself it is well worth the money asked. It is in the mouuntains and is covered with a large amount of feed; this, wth its elevation makes it valuable as summer range, and especially so in a dry year. Several hundred steers can be fattened thereon each season. It possesses a singular strategic value due to its location in the heart of a large and valuable range used and claimed in connection with the Spanish Ranch. An independent owner of the tract can graze sheep over the surrounding range in such manner as to take much of its use and value away from those who may be operating the Spanish Ranch. Incomplete control of the range, if a fact, will be given much weight by any one contemplating purchase of this portion of the property. The receiver was therefore ordered to complete the purchase of the Lesher land."

(Tr. pp. 12-13.)

Counsel suggest, in an attempt to waive aside the force and logic of Judge Farrington's reasoning, that he advances merely "reasons of expediency." A moment's consideration will, we think, show this court that the unsecured creditors are interested chiefly in realizing the best price possible from the sale of the livestock and personal property, and also, in such a conservation of the real estate as to leave an equity value to be utilized for the satisfaction of the unsecured claims. The Lesher Ranch purchase accomplished all of these purposes, and it was with these purposes in view that the District Court made the order from which the appeal is taken. That order should be affirmed.

Very respectfully submitted,

S. W. BELFORD,
GEO. S. BROWN,
J. W. DORSEY
W. E. CASHMAN
Attorneys for Appellees.

No. 4410

In the United States
Circuit Court of Appeals
For the Ninth Circuit

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

VS.

UNION LAND AND CATTLE COMPANY, a Corporation, W. T. Smith, as Receiver for said Union Land and Cattle Company, Under and by Virtue of that Certain Order Given and Made by the District Court for the District of Nevada, on July 28, 1920, SILVERIA GARAT, W. T. HITT, EMMA McLAUGHLIN, HENRIETTA MOFFAT, MAUD B. CLEMONS, FRANCES C. RICKEY, W. A. DILL, W. H. FRAZER, ELIZABETH SHARP, MRS. ALOYSIUS DAVEY, and J. W. DORSEY,

Appellees.

Petition for Re-Hearing

S. W. BELFORD,
GEORGE S. BROWN,
J. W. DORSEY,
W. E. CASHMAN.
Attorneys for Appellee

No. 4410

In the United States

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For the Ninth Circuit

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Appellees.

Petition for Re-Hearing

Comes now W. T. Smith, as Receiver for said Union Land & Cattle Company, one of the appellees above-named, and respectfully petitions this

court to grant a re-hearing of said cause, for the following reasons, to-wit:

1.

In the opinion in this case reference is made to the opinion filed in this court in cases 4195-4196, and the order of the United States District Court, for the District of Nevada is reversed upon the ground that said order conflicts with the opinion of this court in said cases 4195 and 4196. In that opinion this court said:

> "As already stated, the order authorizing the incurring of an indebtedness * * * seems inconsistent with a policy of speedy liquidation. **Such orders may have been justified in the earlier stages of the receivership,** but the time has arrived when there should be retrenchment instead of expansion."
>
> 297 Fed. 353, 358.

The undisputed evidence in this case shows that the Receiver was appointed on July 28, 1920, and **that the contract in question was executed in June, 1922.** This was "in the earlier stages of the receivership," and it was at a time when the Receiver was operating the property **with the consent of the appellants** as a going concern, under the original order of his appointment.

II.

The order appointing the Receiver contained the following direction, to-wit:

> "Said Receiver is hereby authorized and empowered * * * to carry on the business of the defendant corporation according to the usual course of business of like character and to employ such employees, accountants, agents, assistants and attorneys as he may deem necessary and proper."
>
> (Page 263, Transcript of Record Case 4195.)

This order was entered with the consent of all the creditors, including the appellants here.

III.

Two payments had been made on the purchase price of the Lesher ranch before the failure of the creditors' agreement of 1923. Three payments, amounting to $6,000.00, had been made on the purchase price of the Lesher Ranch **before the decision of this court ordering the liquidation of the property.**

IV.

The contract had been executed nearly two years prior to the decision of this court ordering the liquidation of the property.

V.

It is immaterial whether the first two payments were carried as "rent," or not. The undisputed testimony is that the contract was made in June, 1922, by an agent of the Receiver, for the benefit of the receivership itself.

VI.

The Lesher property has been used continuously by the Receiver from the date of the contract of purchase for the sole and exclusive purpose of protecting the livestock on the Spanish Ranch, which was a measure solely and exclusively for the benefit of the unsecured creditors. It had been so operated as an integral part of the Spanish Ranch.

VII.

The opinion and order of this court makes the Receiver responsible for at least three payments, amounting to the sum of $6,000.00, when the undisputed evidence shows that all of these payments had been made prior to the decision of this court ordering the liquidation of the property.

VIII.

The court refers to the fact that the cattle company, before the receivership, "managed its busi-

nessness without buying the extensive acreage which the Receiver would now add to its properties." If that fact were at all material, the answer to it is found in the further fact that the cattle company, before the receivership, was unable to obtain title to the land, but it is not, in our opinion, a material factor, nor should it be so considered.

IX.

The court further held: "Even though the purchase of the land **might not be unwise from the general business stand-point of a concern to be kept going,**" etc. The undisputed testimony before the court shows that this land was purchased at a time when this concern was **"to be kept going."** It should not, therefore, be regarded as an abuse of discretion to authorize the contract to purchase the land, when the contract was made at that time.

X.

The court has further found: "Upon no ground can we find sound reason for sustaining the order approving the action of the Receiver in purchasing the Lesher tract and paying $10,000.00, or any sum **therefor, out of the moneys of the cattle company.**"

In other words, nothwithstanding the fact that

the ranch was purchased at a time when the Union Land & Cattle Company receivership was a going concern receivership, and, nothwithstanding the fact that three payments were made prior to the order of this court for the liquidation of the property, the Receiver is not to be allowed anything on payments theretofore made.

XI.

The original order of the appointment of the Receiver contained ample authority for the purchase of the Lesher land and ample authority for making the payments on the purchase price of such lands, until modified by the decision of this court on April 7, 1924.

XII.

The undisputed testimony shows that there was no abuse of discretion in the District Court in authorizing the completion of a contract made when the Union Land & Cattle Company was operated as a going concern, for the following reasons:

A. The testimony before the court showed that, unless such land was purchased, the range used by the cattle would be seriously endangered and the cattle were the primary assets of the unsecured creditors.

B. That, at the time of the completion of the

purchase, competitive interests desiring the use of the Spanish Ranch range were seeking to purchase the Lesher tract.

C. That, after the use of this tract of land by the Receiver continuously from June, 1922, to the present time, the land could be sold for the purchase price thereof.

XIII.

In the opinion of the Receiver, the General Manager and the District Court, the liquidation of the Spanish Ranch, as directed by this court, could be better accomplished, and the land sold for a better price, if the Lesher tract were included therein.

XIV.

In the opinion of the Receiver, the General Manager and the District Court, it would be more difficult to find a purchaser for the Spanish Ranch, if the Lesher tract were in the possession of any competitive interest.

XV.

The undisputed evidence showed that there was no abuse of discretion on the part of the District Court, and that it had the right to exercise its best

judgment in this matter, and that it did so exercise it.

Very respectfully submitted,
S. W. BELFORD,
GEORGE S. BROWN,
J. W. DORSEY,
W. E. CASHMAN,
Attorneys for Appellee

I DO HEREBY CERTIFY that, in my judgment, the foregoing petition for re-hearing is well founded, and further certify that said petition is not interposed for delay.

Attorney for Appellee.

No. 4412

United States

Circuit Court of Appeals

For the Ninth Circuit.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4412

United States

Circuit Court of Appeals

For the Ninth Circuit.

NAVAJO COUNTY,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Admission of Service of Citation on Writ of Error 298
Amended Complaint 62
Answer 41
Application of Enlargement of Time to File Record 300
Assignment of Errors 236
Bill of Complaint 1
Bill of Exceptions 110
Certificate of Clerk U. S. District Court to Transcript of Record 306
Citation on Writ of Error 297
Complaint 24
Defendant's Answer to Paragraphs 6 and 8 of Amended Complaint, as Substituted March 20, 1924 96
Defendant's Motion for Judgment 102
Demurrer 57

EXHIBITS:

Exhibit No. 4—Report of County Engineer Upon Proposals for Construction of Bridges 208, 283

Index. Page

EXHIBITS—Continued:
Exhibit No. 6—Letter Dated September 27, 1916, E. B. Merritt to R. C. Cresswell. 193
Exhibit No. 9—Demand on Navajo County by Mesmer & Rice, Dated October 1, 1917 196
Exhibit No. 10—Demand on Navajo County, Dated November 5, 1917..... 197
Exhibit No. 11—Demand on Navajo County, Dated December 3, 1917.... 199
Exhibit No. 13—Letter Dated August 9, 1916, Thomas F. Nichols to Board of Supervisors of Navajo County..... 201
Exhibit No. 17—Demand on Navajo County, Dated May 21, 1918..... 206
Plaintiff's Exhibit No. 19—Demand on Navajo County by Mesmer & Rice, Dated May 7, 1917..... 281
Judgment 107
Minutes of Court—March 22, 1920—Order Re Demurrer 55
Minutes of Court—April 24, 1922—Order Re Motion to Make More Definite and Certain. 61
Minutes of Court—January 14, 1924—Order Re Motion to Dismiss 81
Minutes of Court—March 17, 1924—Trial..... 82
Minutes of Court—March 18, 1924—Trial (Continued) 86
Minutes of Court—March 19, 1924—Trial (Continued) 88

Index. Page

Minutes of Court—March 20, 1924—Trial (Continued) 89
Minutes of Court—March 21, 1924—Trial (Continued) 94
Minutes of Court—April 8, 1924—Order Extending Time to and Including April 20, 1924, to File Brief of Points and Authorities 100
Minutes of Court—May 9, 1924—Order Granting Defendant Additional Time to File Reply Brief 101
Minutes of Court—May 30, 1924—Order Granting Plaintiff Additional Time to File Reply Brief 105
Minutes of Court—July 8, 1924—Judgment... 107
Minutes of Court—July 8, 1924 — Order Overruling Motion for Judgment 106
Minutes of Court—July 11, 1924—Order Extending Time to File Bill of Exceptions.. 108
Minutes of Court—October 2, 1924—Order Extending Time to and Including October 17, 1924, to File Bill of Exceptions..... 109
Minutes of Court — October 16, 1924 — Order Extending Time to and Including October 25, 1924, to Settle Bill of Exceptions..... 230
Minutes of Court — October 17, 1924—Order Extending Time to and Including October 27, 1924, to Settle Bill of Exceptions..... 231
Minutes of Court—October 17, 1924—Order Re

Index. Page

Proposed Amendments to Bill of Exceptions 232
Minutes of Court — October 25, 1924 — Order Permitting Temporary Withdrawal of Bill of Exceptions from Files 233
Minutes of Court—November 24, 1924—Order Re Transmission of Original Exhibits..... 299
Motion to Make More Definite and Certain.... 59
Names and Addresses of Attorneys of Record.. 1
Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond..... 291
Order Extending Time to and Including April 20, 1924, to File Brief of Points and Authorities 100
Order Extending Time to and Including October 17, 1924, to File Bill of Exceptions.... 109
Order Extending Time to and Including October 25, 1924, to Settle Bill of Exceptions... 230
Order Extending Time to and Including October 27, 1924, to Settle Bill of Exceptions... 231
Order Extending Time to and Including December 4, 1924, for Filing Record With the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit..... 302
Order Extending Time to File Bill of Exceptions 108
Order Granting Plaintiff Additional Time to File Reply Brief..... 105

Index. Page

Order Granting Defendant Additional Time to File Reply Brief..... 101
Order Overruling Motion for Judgment 106
Order Permitting Temporary Withdrawal of Bill of Exceptions from Files..... 233
Order Re Demurrer 55
Order Re Motion to Dismiss 81
Order Re Motion to Make More Definite and Certain 61
Order Re Proposed Amendments to Bill of Exceptions 232
Order Re Transmission of Original Exhibits.. 299
Petition for Writ of Error..... 234
Praecipe for Transcript of Record..... 295
Proposed Amendments to Bill of Exceptions... 217
Return on Writ of Error..... 294
Subpoena Ad Respondendum..... 21
Substitute Paragraphs in Amended Complaint. 91
Supersedeas and Appeal Bond..... 303

TESTIMONY ON BEHALF OF PLAINTIFF:

CRESWELL, R. C. 119
Cross-examination 187
ELLSWORTH, WALLACE 111
MESMER, LOUIS F. 140
OWENS, C. E.—Recalled—Cross-examination 126
POPERT, W. H. 167
Recalled—Redirect Examination..... 173

Index. Page

TESTIMONY ON BEHALF OF PLAINTIFF—Continued:
TEEPLE, R. S. 136
Cross-examination 137

TESTIMONY ON BEHALF OF DEFENDANT:
CRESWELL, R. C.—Cross-examination.. 181
Trial 82
Trial (Continued—March 18, 1924)..... 86
Trial (Continued—March 19, 1924)..... 88
Trial (Continued—March 20, 1924)..... 89
Trial (Continued—March 21, 1924)..... 94
Writ of Error 292

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

THORWALD LARSON, Holbrook, Arizona,

CLARK & CLARK, Heard Building, Phoenix, Arizona,

Attorneys for Plaintiff in Error.

GEORGE J. STONEMAN, 1209–1217, Broadway Arcade Building, Los Angeles, California,

Attorney for Defendant in Error.

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

IN EQUITY—No. E–29 (PRESCOTT).

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

BILL OF COMPLAINT.

The above-named complainant, complaining of the above-named defendant, for cause of action avers:

I.

That the complainant now is and at all times hereinafter mentioned has been a citizen of the

United States and an inhabitant and resident of the southern district of California; and that defendant Navajo County is a political subdivision of the State of Arizona, and is included within the Prescott division of the District Court of the United States, for the District of Arizona.

II.

That the amount in controversy in this suit exceeds the sum of three thousand dollars, exclusive of interest and costs, and that the jurisdiction of this Honorable Court depends upon diversity of citizenship of complainant and defendant.

That on the 5th day of September, 1916, and for a long time prior thereto, this complainant under the name and style of Mesmer & Rice, was a contractor engaged in the business of erecting bridges and in response to an invitation and call for bids prior to the 5th day of September, 1916, advertised by defendant [1*] for the construction of certain bridges for which appropriations had been theretofor made by defendant, complainant submitted to defendant his bid for the construction of certain bridges to be erected by the defendant and particularly for that cerain bridge to be erected by defendant across the Little Colorado River near Winslow, Arizona, hereinafter referred to as contract #1, Bridge T–3, and that said bid was accompanied by specifications prepared by complainant and a proposal to erect and contract said bridge T–3 for certain sums, dependent upon the design and construction desired by defendant, among which

*Page-number appearing at foot of page of original certified Transcript of Record.

specifications was a proposal to construct said bridge according to specifications therewith submitted for the sum of $23,800.00. Said proposal contained a provision designed by the complainant and intended by complainant to be understood by defendant to cover extras and additional quantities of material which might be by defendant required or designated to be used, which provision is in words and figures as follows, to wit:

"If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place .. $20.00 per yd.

(b) Additional structural steel in place ..... 7.5¢ per lb.

(c) Additional reinforcing steel in place ..... 7¢ per lb.

(d) All other work will be done on the percentage basis at actual cost plus 15%."

That said proposal contained the provision hereinabove set forth and referred to was and is in words and figures as follows, to wit:

"We the undersigned, hereby propose to furnish all materials and all labor necessary and requisite to perform and complete in a first class and workmanlike manner the construction of the seven new steel bridges to be built in Navajo County, Arizona as per General Specifications prepared by Mr. Charles F. Perkins, County Engineer, Holbrook, Arizona, and per specifications and drawings submitted herewith, for the following prices for each bridge separately. [2]

Contract #1—Bridge T–3 over Little Colorado River near Winslow as shown on drawing #4183, with 14′ roadway concrete floor steel joists, steel railing, resting on steel concrete pier, with number of trusses as shown, with all field connection riveted, all for *for* the sum of $31,242.00.

(a) REGULAR DESIGN, with three spans as described above.

(b) Same as (a) except with wood floor and steel joists for $23,800.00

(c) Same as (a) except with wood floor and wood joists for 22,050.00

(d) Same as (a) except with 12′ roadway for 28,894.00

(e) Same as (d) except with wood floor and steel joists for 21,610.00

(f) Same as (d) except with wood floor and wood joists for 20,170.00

(aa) ALTERNATE DESIGN, as described under (a) except five spans 25,290.00

(bb) Same as (aa) except with wood floor and steel joists for 19,000.00

(cc) Same as (aa) except with wood floor and wood joists for 17,220.00

(dd) Same as (aa) except with 12′–0″ roadway for 24,520.00

(ee) Same as (dd) except with wood floor and steel joists for 18,400.00

(ff) Same as (dd) except with wood floor and wood joists for 17,030.00

(g) For wood railing instead steel railing deduct 500.00
(b) For bolting field connections instead of riveting deduct 250.00
(j) For concrete web between steel cylinders, add ..... 25.00 per yd.

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place... 20.00 per yd.
(b) Additional structural steel in place 7.5¢ per lb.
(c) Additional reinforcing steel in place 7¢ per lb.
(d) All other work will be done on the percentage basis, at actual cost plus 15%.

All the above proposals, while bid on separately, are for all seven bridges and cannot be accepted for any one bridge. If, however we are low bidder on 75% or 80% of the work, we will entertain a proposition from your honorable board, but it is our intention to do all of the work and we have bid accordingly.

Respectfully submitted,
MESMER & RICE,
By LOUIS F. MESMER.

Holbrook, Arizona, July 1, 1916."

III.

That on the 7th day of August, 1916, the Board of Supervisors of Navajo County, defendant above named, having regularly convened for the purpose of acting upon the proposals and specifications submitted by complainant for the erection of the bridges mentioned, made and entered its order

that the [3] bid of complainant submitted under the firm name of Mesmer & Rice, of Los Angeles, California, being the lowest and best bid received for the construction of the bridge across the Little Colorado River, near Winslow, at a cost of $23,-800.00, the same was accepted and approved subject to approval of contract, specifications and plans therefor by the United States Indian Department, which department was to pay one-half the cost of the construction of said bridge; and that thereafter, pursuant to said order, entered into a contract and agreement with complainant, under and by the terms of which complainant was authorized to enter upon the construction of said bridge T–3, for the sum of $23,800.00; and in addition thereto it was provided by the terms of said contract that the extra substructure of said bridge was to be paid for "as per addenda for extras upon the proposals accepted."

Such contract is in words and figures as follows, to wit:

"This agreement, made and entered into this 5th day of September, A. D. 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part and Louis F. Mesmer, doing business under the name of Mesmer & Rice, of Los Angeles, California, the party of the second part.

WHEREAS the party of the first part heretofore advertised for bids for the construction and building of certain bridges, and

WHEREAS said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the third day of July, A. D. 1916, for the construction and building of the bridge hereinafter mentioned, and

WHEREAS, the party of the second part submitted bid for constructing and building said bridge, and

WHEREAS, the said bid of the party of the second part appears to be the lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and

WHEREAS, for the purpose of identification and to set forth more fully the provisions and stipulations of said contract, said call for bids with specifications for such bridge is hereto attached and made a part hereof, and

WHEREAS, for the same purposes the said bids are hereto attached and made a part hereof, and

WHEREAS, the said party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described, for the sum of Twenty-three Thousand Eight Hundred and no/100 ($23,800.00) Dollars.

NOW THEREFORE, the said party of the second part has agreed, and by these presents does agree to and with the party of the first part, for and in consideration of Twenty-three Thousand Eight Hundred and no/100 ($23,800.00) Dollars [4] to furnish all the material and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications desig-

nated and attached hereto and made a part hereof, to construct and erect the following bridge, upon the site herein named, to wit:

Bridge T–3 over Little Colorado River, east of Winslow.

Superstructure—3–165′–4″, riveted H–T, steel spans as per superstructure plan on drawing No. 4183; superstructure to be as follows (as per addenda for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8′ in diam.; filled with a rich concrete resting upon twelve piles driven to a refusal of a fifteen tons load each; the upper steel cylinder to be fifteen feet in length or such that its upper end will be level a point two feet above the bottom chord of the adjoining A. T. & S. F. R. R. bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be six feet in diam. and filled with a rich concrete mixture connected with the lower concrete by 12 1″ twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18″ reinforced concrete wall of an equal length with the said upper cylinders and abutments to consist of two thirty foot steel cylinders each, six feet in diam.; filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall. It is further agreed that in the event of any changes being made by the party of the first part, or any extra required by the party of the first part, such charges of extras shall be

made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore described according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party of the second part in constructing said bridge in accordance with cause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the aforesaid bridge shall be made immediately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law ~~except~~[1]. [5]

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

It is also stipulated that as an evidence of good faith in the performance of this contract, the said

Louis F. Mesmer will furnish and give to the party of the first part good and sufficient bond in the penal sum of six thousand dollars.

The party of the second part shall provide sufficient safe and proper facilities at all times for the inspection of the work by the party of the first part, or its agent, and shall within twenty-four hours after receiving written notice from the party of the first part, or its agent, to that effect, proceed to remove from the grounds all materials, which may be condemned, whether worked or unworked, and to tear down all portions of the work which may be condemned by the party of the first part or its agent, as unsound and improper or in any way failing to conform to the plans and specifications hereinbefore mentioned, and it is understood that the party of the first part will at all times have an inspector present during the progress of the work on the bridge hereinbefore mentioned, and if not, this clause in this contract is null and void.

Should the party of the second part be obstructed or delayed in the prosecution of completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The party of the second part agrees and stipulates that if he shall delay the material progress of the work so as to cause any damage for which

the party of the first part may become liable, or perform any other act for which the party of the first part may become liable, then and in that event the party of the second part shall make good to the party of the first part any such damage.

If at any time there shall be evidence of any lien or claim for which, if established, the party of the first part might become liable, and which is chargeable to the party of the second part, the party of the first part shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify it against such lien and claim, and should there prove to be any such claim, after all payments are made, the party of the second part shall refund to the party of the first part all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the default of the party of the second part.

It is further mutually agreed by and between the parties hereto that no certificate given nor payment made under this contract except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper materials.

It is also understood and agreed that A and B Company Standard Specifications for highway bridges have been and are hereby [6] adopted as the general reference for the construction of the bridge mentioned herein.

The said parties for themselves, their successors and assigns, heirs, administrators and executors, do hereby agree to the full performance of the covenants herein contained, and conform to the specifications and plans hereto annexed and made a part thereof, except where either of same may be changed in accordance with the provisions hereinbefore mentioned.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands the day and year first above written.

NAVAJO COUNTY.
By R. C. CRESWELL,
Chairman,
GEO. W. HENNESSEY,
Member,
Q. R. GARDNER,
Member,
Board of Supervisors.
[Seal] Attest: DEE M. MOSS,
Clerk, Board of Supervisors.
LOUIS F. MESMER,
Doing Business Under Name of Mesmer & Rice.

IV.

Complainant avers that under the terms of said contract he entered upon the construction of said bridge, but that thereafter, and from time to time during the performance of labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to and required of complainant that certain changes and alterations be made in the original specifications,

which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras, as set forth in said proposal, contract and specifications.

V.

That on the ninth (9) day of August, 1916, and after the original proposal, plans and specifications for the erection of said bridge had been submitted by complainant and accepted by [7] defendant, said defendant was advised that through an appropriation by the United States Government to be disbursed through the Commissioner of Indian affairs, there would be available for the construction of said bridge, and in addition to the sum appropriated by defendant, the sum of $15,000.00. This sum was, however, available upon condition, as complainant is advised, that the original plans and specifications so submitted by complainant should be changed and altered in a manner so as to permit the construction of a stronger structure, and in a manner to be approved by the Commissioner of Indian Affairs. That it was not, however, at this time known, either to the complainant or to defendant, the exact nature of such changes nor the expense which would be incident thereto, for which reason complainant avers, it was agreed, or should have been agreed between complainant and defendant, that such changes as were for this reason required to be made should be paid for as extras,

according to the price and terms of that portion of complainant's contract hereinabove in paragraph II of this complaint particularly referred to and set forth, and complainant, relying upon this understanding and agreement so had with defendant, completed said bridge in compliance in all respects, with the contract and agreement, at an expense to him, over and above the original contract price of $23,800.00, of the sum of $13,-973.65, which sum, complainant avers became and was a necessary expenditure by reason of the changes directed by defendant, as aforesaid, in the construction of said bridge with sub-structure and approaches.

VI.

That upon the completion of said bridge by complainant on or about the 3d day of December, 1917, complainant presented to defendant, through its Board of Supervisors, statement of the amount due him, on account of labor and materials performed and supplied for the construction of said bridge under the conditions hereinabove [8] set forth, showing a balance due from defendant to complainant of the sum of $13,973.65 and that on said date complainant was finally advised that defendant claimed and would claim that all of the work so by complainant performed upon said bridge and all of the supplies and materials entering into the erection and construction thereof were by defendant understood and assumed to be included in the sum of $23,-800.00, being the original contract price submitted in the original bid of complainant, and that notwith-

standing the fact that the expense of constructing said bridge had entailed an actual loss to complainant, over such contract price of the sum of $13,973.65, said defendant through its Board of Supervisors, assuming to act, as complainant is advised and believes and so avers, through the advice of the County Attorney of said Navajo County, construed and would construe said contract as a contract entitling complainant to no more than the said sum of $23,800.00.

That complainant has at various and divers times since said third day of December, 1917, attempted to reach an agreement and adjustment with defendant, but that said defendant, through its Board of Supervisors and its County Attorney, has persisted in refusing to construe said contract as entitling complainant to more than the sum of $23,800.00, and has refused, and still does refuse, to construe that portion of said contract covering extras as entitling complainant to any extra compensation arising through changes and modifications of the original specifications, so as aforesaid made necessary by the demands and requirements of defendant and its officers and agents.

VII.

Complainant avers that subsequent to the 9th day of August, 1916, defendant, its officers and agents, entered into a series of conferences with representatives of the Indian Department of the United States Government for the purpose of determining what changes and alterations from the original plans and specifications [9] submitted by complainant would be made necessary so as to meet the re-

quirements of the Indian Department and permit defendant to avail itself of the $15,000.00, so as in this complaint alleged, appropriated by said Indian Department. That by reason of such acts on the part of the defendant, its officers and agents, complainant was prevented from entering upon the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original specifications, and was delayed in the commencement of said work during the year 1916 and subsequent to the 9th day of August, until the year 1917; that such delay ensuing and so caused as aforesaid, was without the fault of complainant and resulted in preventing complainant from entering upon the construction of said bridge during the period, in the years 1916 and 1917, when through the absence of flood waters in the Little Colorado River, said bridge could have been constructed at a minimum cost. That the expense incident thereto was not provided for in the contract hereinabove set forth, as would have been the case had complainant known that such delays would have ensued, and that by reason of such delays, through the interference of flood waters and increase in the cost of material, complainant in addition to the sum of $13,973.65 hereinabove in this complaint claimed as the actual cost of extra material, was compelled to expend and did expend the further sum of $3,216.00, the payment of which sum the complainant avers was and is justly due him, and provision for the payment thereof should have been included in the terms of the contract.

VIII.

Complainant is informed and believes, and upon such information and belief avers that defendant, acting through its officers, agents and employees, knew at the time said proposed changes were discussed, so as aforesaid embodying additional requirements as to structure imposed by the United States Government and so requiring [10] in order, as complainant avers, that defendant might have the benefit and advantage of the sum of $15,000.00 appropriated by the United States Government for the construction of said bridge that such changes and alterations would entail an expense to complainant largely in excess of the sum of $23,800.00, and under these conditions it became, was and now is the duty of the defendant, its officers, and agents, to include in the contract hereinabove set forth a clause covering such additional expenditures, in the event said claim in said contract so particularly mentioned and set forth in paragraph 11 in this bill of complaint should or could be construed by defendant, its officers, agents or employees, in a manner so as to prevent complainant from claiming compensation for such extra work under such clause. Complainant avers that if such clause does not express the intention of both parties to said contract in a manner sufficient so to do, that it was omitted therefrom at the time of the execution thereof and the performance of such labor and the furnishing of such extra material by complainant, through accident or mistake on the part of complainant, or through the intentional withholding

from complainant, on the part of defendant, its officers, agents or employees, of their construction and understanding of the meaning of such clause, and that to permit defendant, its officers, agents or employees to take advantage of their own knowledge or fraud, or the accident or mistake of complainant, was and is inequitable, and does and will work a constructive fraud and unconscionable hardship upon this complainant.

IX.

This complainant avers that on the 3d day of December, 1917, and for the reason that defendant, acting through its Board of Supervisors and said County Attorney, continued in its refusal [11] to recognize the right, claim and demand of complainants for compensation under the contract in paragraph 11 of this bill of complaint set forth, and continued in its instance that complainant was entitled to no more than $23,800.00, and that the total amount due complainant under the terms of said contract was $6204.62, they presented a demand on the County of Navajo for said amount of $6204.62 "on contract of Little Colorado River bridge, together with extras herein listed, the items of which are hereto annexed." Said extras included only labor for drilling holes, $27.14 #1958.4 reinforced steel, $127.07 and labor furnished engineer $31.40, and on said date received warrant from defendant for said sum of $6204.62.

Complainant avers that he was dissatisfied with the rejection of his claim and demand upon defendant for the amount of his contract in excess of

the sum of $6204.62, to wit, in the sum of $17,189.65, and accepted the amount so paid to them by defendant under protest and with a reservation of the right to sue for the further sum of $17,189.65, and that the balance so due the complainant as alleged and set forth in this bill of complaint was expressly and by distinct understanding between complainant and defendant through its Board of Supervisors reserved to both complainant and defendant for further discussion and such proceedings as to either complainant or defendant might be deemed necessary or advisable, and it was distinctly agreed and understood between the parties hereto that the acceptance by complainant of the warrant for $6204.62 should not be by defendant paid or by complainant received in liquidation or settlement of the amount claimed by complainant to be due under the terms of said contract.

FORASMUCH, THEREFORE, and as complainant avers that he is without plain, speedy or adequate remedy at law for the redress of [12] the wrongs and injuries complained of, and for the reason, as complainant avers, that said contract and agreement does not, under the conditions herein set forth, express the intention of both parties thereto, complainant prays the order and decree of the Honorable Court; that upon the taking of testimony herein and the ascertainment of the facts as in this complaint alleged and set forth, this Honorable Court shall make and enter its decree.

FIRST. In the event it may be ascertained by this Court that the provision contained in the con-

tract covering extras, as hereinabove in paragraph 11 of this bill of complaint set forth, shall not in effect be broad and specific enough in its terms to express the real intention of the parties, and that such failure was due to mutual mistake, that such contract be so reformed as to enable complainant thereunder to recover from defendant such sums as may be found to be justly due and owing complainant and attributable to extra labor and material performed and supplied and to loss of time, through changes made by defendant in the original specifications submitted by complainant for the construction of said bridge; or

SECOND. In the event this Honorable Court shall find from the evidence that said contract is not in its terms ambiguous, and that complainant shall be, under a strict interpretation thereof, entitled to no more than the sum of $23,800.00, that such contract be rescinded and held for naught, and that complainant do have and recover from defendant such amount, over and above the sum of $23,800.00 as to this Honorable Court may seem just and proper.

THIRD. That a writ of subpoena may be granted to complainant directed to defendant thereby requiring defendant to appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises (but not under oath, an answer under oath being hereby expressly waived), and further to perform and abide by such further order [13]

direction or decree therefor, as to this Court may seem just and proper.

FOURTH. For such other and further relief as to this Court may seem just and proper.

(Signed) GEORGE J. STONEMAN,
Solicitor for Complainant.
406 Goodrich Bldg., Phoenix, Arizona.

[Endorsed]: Bill of Complaint. Filed May 31, 1918. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [14]

UNITED STATES OF AMERICA.

District Court of the United States, District of Arizona.

IN EQUITY.

SUBPOENA AD RESPONDENDUM.

The President of the United States, GREETING:

To Mr. Teeples, Clerk Board of Supervisors, Navajo County, Holbrook, Arizona, R. C. Creswell, Chairman Board of Supervisors Navajo County, Winslow, Arizona.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States, District of Arizona, at the courtroom in Prescott, Arizona, twenty days from the date hereof, to answer a bill of complaint exhibited against Navajo County, in said Court by Louis F. Mesmer, an individual, doing business under the name and style of Mesmer & Rice, who is a citizen of the

State of California, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this 31st day of May, in the year of our Lord one thousand nine hundred and eighteen, and of our Independence the 142d.

[Seal] MOSE DRACHMAN,
Clerk.
By Nat. T. McKee,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the 20th day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said bill; otherwise the said bill may be taken *pro confesso.*

MOSE DRACHMAN,
Clerk.
By Nat. T. McKee,
Deputy Clerk. [15]

[Endorsed]: No. E–29 (Prescott). Mar. Docket No. 799. U. S. District Court, District of Arizona. In Equity. Louis F. Mesmer, an Individual, Doing Business Under the Name and Style of Mesmer & Rice, vs. Navajo County. Subpoena Ad Respondendum. (Stamped:) Filed Jun. 28, 1918. Mose Drachman, Clerk. By Nat. T. McKee, Deputy.

UNITED STATES MARSHAL'S RETURN.

I received this writ at Phoenix, Arizona, June 1, 1918, and executed the same June 26, 1918, at Phoenix, Arizona, by placing in the United States postoffice at Phoenix, Arizona, two separate packages, to be sent by registered mail, by the Postoffice Department, addressed to R. C. Creswell, Chairman, Board of Supervisors of Navajo County, at Winslow, Arizona, and R. S. Teeple, Clerk, Board of Supervisors of Navajo County, at Holbrook, Arizona, each of which packages contained a copy of Subpoena ad respondendum, to which was attached a copy of the bill of complaint in the case of Louis F. Mesmer, an individual doing business under the name and style of Mesmer & Rice, vs. Navajo County, Arizona, said case being numbered E–29 (Prescott) and said writ having been issued out of the United States District Court, at Phoenix, Arizona, by Mose Drachman, Clerk of said Court, on the 31st day of May, 1918.

This method of service was followed by instruction of Hon. Geo. J. Stoneman, Attorney of Record for the plaintiff herein. His letter of instruction is hereto attached together with return Registry Receipts from R. C. Creswell and R. S. Teeple.

This writ is returned to the Clerk of the court at Phoenix, Arizona, this 28th day of June, 1918.

J. P. DILLON,
U. S. Marshal.
By D. N. Willits,
Chief Deputy. [16]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

IN LAW—No. 56.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

COMPLAINT.

Comes now Louis F. Mesmer, an individual, doing business under the name and style of Mesmer & Rice, leave of Court to file a complaint on the law side of this court in lieu of bill in equity heretofore filed having been first had and obtained, and complaining of Navajo County, defendant above named, for cause of action alleges:

I.

That the plaintiff now is and at all times hereinafter mentioned has been a citizen of the United States and an inhabitant and resident of the southern district of California; and that defendant, Navajo County, is a political subdivision of the State of Arizona, and is included within the Prescott Division of the District Court of the United States, for the District of Arizona.

II.

That the amount in controversy in this suit ex-

ceeds the sum of three thousand dollars, exclusive of interest and costs, and that the jurisdiction of this Honorable Court depends upon diversity of citizenship of plaintiff and defendant.

That on the 5th day of September, 1916, and for a [17] long time prior thereto, this plaitiff under the name and style of Mesmer & Rice, was a contractor engaged in the business of erecting bridges, and in response to an invitation and call for bids prior to the 5th day of September, 1916, advertised by defendant for the construction of certain bridges for which appropriations had been theretofore made by defendant, plaintiff submitted to defendant his bid for the construction of certain bridges to be erected by the defendant and particularly for that certain bridge to be erected by defendant across the Little Colorado River near Winslow, Arizona, hereinafter referred to as Contract #1, Bridge T–3, and that said bid was accompanied by specifications prepared by plaintiffs and a proposal to erect and construct said Bridge T–3 for certain sums, dependent upon the design and construction desired by defendant, among which specifications was a proposal to construct said bridge according to specifications therewith submitted for the sum of $23,800.00. Said proposal contained a provision designed by the plaintiff and intended by plaintiff to be understood by defendant to cover extras and additional quantities of material which might be by defendant required or designated to be used, which provision is in words and figures as follows, to wit:

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place ...$20.00 per yd.
(b) Additional structural steel in place ..... 7.5¢ per lb.
(c) Additional reinforcing steel, in place .....7¢ per lb.
(d) All other work will be done on the percentage basis at actual cost plus 15%.

That said proposal containing the provision hereinabove set forth and referred to was in words and figures as follows, to wit: [18]

"We, the undersigned, hereby propose to furnish all materials and all labor, necessary and requisite to perform and complete in a first class and workmanlike manner the construction of the seven new steel bridges to be built in Navajo County, Arizona, as per General Specifications prepared by Mr. Charles E. Perkins, County Engineer, Holbrook, Arizona, and per specifications and drawings submitted herewith for the following prices for each bridge separately:

Contract #1, Bridge T–3, over Little Colorado River near Winslow as shown on drawing #4183, with 14′ Roadway concrete floor, steel joists, steel railing, resting on steel concrete pier, with number of trusses as shown, with all field connection riveted, all for the sum of.....$31,242.00

(a) REGULAR DESIGN, with three spans as described above.

(b) Same as (a) except with wood floor and steel joists for 23,800.00

(c) Same as (a) except with wood floor and wood joists for 22,050.00

(d) Same as (a) except with 12′ roadway for 28,894.00

(e) Same as (d) except with wood floor and steel joists for 21,610.00

(f) Same as (d) except for wood floor and wood joists for 20,170.00

(aa) ALTERNATE DESIGN, as described under (a) except five spans 25,290.00

(bb) Same as (aa) except with wood floor and steel joists for 19,000.00

(cc) Same as (aa) except with wood floor and wood joists for 17,200.00

(dd) Same as (aa) except with 12′ wood floor roadway for 24,520.00

(ee) Same as (dd) except with wood floor and steel joists for 18,400.00

(ff) Same as (dd) except with wood floor and wood joists for 17,030.00

(g) For wood railing instead steel railing deduct..... 500.00

(b) For bolting field connections instead of riveting deduct 250.00

(j) For concrete web between steel cylinders, add..... 25.00 per yd.

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place.....20.00 per yd.

(b) Additional structural steel in place ..... 7.5¢ per lb.

(c) Additional reinforcing steel in place ..... 7 ¢ per lb.

(d) All other work will be done on the percentage basis at actual cost plus 15%.

All the above proposals, while bid on separately, are for all seven bridges and cannot be accepted for any one bridge. If, however, we are low bidder on 75% or 80% of the work, we will entertain a proposition from your Honorable Board, but it is our intention to do all of the work and we have bid accordingly.

Respectfully submitted,

MESMER & RICE.

By LOUIS F. MESMER.

Holbrook, Arizona, July 1st, 1916." [19]

III.

That on the 7th day of August, 1916, the Board of supervisors of Navajo County, defendant above named, having regularly convened for the purpose of acting upon the proposals and specifications submitted by plaintiff for the erection of the bridge mentioned, made and entered its order that the bid of plaintiff submitted under the firm name of Mesmer & Rice, of Los Angeles, California, being the lowest and best bid received for the construction of the bridge across the Little Colorado River, near Winslow, at a cost of $23,800.00, the same was accepted and approved subject to approval of contract, specifications and plans therefor by the United States Indian Department, which Department was to pay one-half the cost of the construction of said bridge; and that thereafter, pursuant to said order, entered into a contract and agreement with plaintiff, under and by the terms of which plaintiff was authorized to enter upon the construction of said bridge T–3, for the sum of $23,800.00; and in addition thereto it was provided by the terms of said contract that the extra sub-structure of said bridge was to be paid for "as per *addenda* for extras upon the proposal accepted."

Such contract is in words and figures as follows, to wit:

"This agreement, made and entered into this 5th day of September, A. D. 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part, and Louis

F. Mesmer, doing business under the name of Mesmer & Rice, of Los Angeles, California, the party of the second part,

WHEREAS the party of the first part hertofore advertised for bids for the construction and building of certain bridges and,

WHEREAS said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the 3d day of July, A. D. 1916, for the constructing and building of the bridge hereinafter mentioned, and

WHEREAS the party of the second part submitted bid for construction and building said bridge, and

WHEREAS the said bid of the party of the second [20] part appears to be the lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and

WHEREAS, for the purpose of identification and to set forth more fully the provisions and stipulations of this contract, said call for bids with specifications for such bridge is hereto attached and made a part hereof, and

WHEREAS, for the same purposes the said bids are hereto attached, and made a part hereof, and

WHEREAS the said party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described, for the sum of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars,

NOW, THEREFORE, the said party of the second part has agreed and by these presents does agree to and with the party of the first part, for and in consideration of twenty-three thousand eight hundred and no/100 ($23,800) dollars, to furnish all the materials and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications designated and attached hereto and made a part hereof, to construct and erect the following bridge, to wit:

Bridge T–3, over Little Colorado River, east of Winslow.

Superstructure: 3–165′, riveted H. T. steel spans as per superstructure plan on drawing No. 4183; superstructure to be as follows (as per *addenda* for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8′ in diam., filled with a rich concrete resting upon twelve piles driven to a refusal of a fifteen tons load each; the upper steel cylinder be fifteen feet in length or such that its upper end will be level with a point two feet above the bottom chord of the adjoining A. T. & S. F. R. R. Bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be 6 ft. in diam. and filled with a rich concrete mixture connected with the lower concrete by 12 1″ twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18″ reinforced concrete wall of an equal length with the said upper cylinders and abutments to consist of two thirty foot steel cylinders each, six feet in

diam., filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall.

It is further agreed that in the event of any changes being made by the party of the first part, or any extras required by the party of the first part, such charges of extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore [21] described, according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party of the second part, in constructing said bridge in accordance with Clause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part, at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the aforesaid bridge shall be made imme-

diately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law ~~except part to be paid by U. S. Government is to be paid according to custom of Indian Department in contracts of this kind as regards time of payment.~~

R. C. C.
Geo. W. H.
Q. R. G.

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

It is also stipulated that as evidence of good faith in the performance of this contract, the said Louis F. Mesmer will furnish and give to the party of the first part good and sufficient bond in the penal sum of six thousand dollars.

The party of the second part shall provide sufficient safe and proper facilities at all times for the inspection of the work by the party of the first part, or its agent, and shall within twenty-four hours after receiving written notice from the party of the first part, or its agent, to that effect, proceed to remove from the grounds all materials which may be condemned, whether worked or unworked, and to tear down all portions of the work which may be condemned by the party of the first part or its agent, as unsound or improper, or in any way failing to conform to the plans and specifications hereinbefore mentioned, and it is understood that the party of the first part will at all times have an inspector present during the progress of the work

on the bridge hereinbefore mentioned, and if not, this clause in this contract is null and void.

Should the party of the second part be obstructed or delayed in the prosecution or completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The party of the second part agrees and stipulates that if he shall delay the material progress of the work so as to cause any damage for which the party of the first [22] part may become liable, or perform any other act for which the party of the first part may become liable, then and in that event the party of the second part shall make good to the party of the first part any such damage.

If at any time there shall be evidence of any lien or claim for which, if established, the party of the first part might become liable, and which is chargeable to the party of the second part, the party of the first part shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify it against such lien and claim, and should there prove to be any such claim, after all payments are made, the party of the second part shall refund to the party of the first part all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the default of the party of the second part.

It is further mutually agreed by and between the parties hereto that no certificate given nor payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper materials.

It is also understood and agreed that A & B company Standard Specifications for highway bridges have been and are hereby adopted as the general reference for the construction of the bridge mentioned herein.

~~It is also hereby stipulated that the plans, specifications~~ and form of contract for the building of the bridge hereinbefore specified, are subject to the approval of the United States Indian Department, and that this contract is not fully binding until the Congressional appropriation of fifteen thousand and no/100 ($15,000.00) dollars for said bridge is available for use ~~in the construction of said bridge.~~

R. C. C.
Geo. W. H.
Q. R. G.

The said parties for themselves, their successors and assigns, heirs, administrators and executors, do hereby agree to the full performance of the covenants herein contained, and conform to the specifications and plans hereto annexed and made a part hereof, except where either of same may be changed in accordance with the provisions hereinbefore mentioned.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands the day and year first above written.

NAVAJO COUNTY,
By R. C. CRESWELL,
Chairman,
GEO. W. HENNESSEY,
Member,
Q. R. GARDNER,
Member,
Board of Supervisors.

[Seal] Attest: DEE M. MOSS,
Clerk, Board of Supervisors.

LOUIS F. MESMER,
Doing Business Under the Name of Mesmer & Rice." [23]

IV.

Plaintiff alleges that under the terms of said contract he entered upon the construction of said bridge, but that thereafter, and from time to time during the performance of labor by plaintiff in the construction of said bridge, defendant through its officers and agents, proposed to and required of plaintiff that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by plaintiff in the original specifications, proposal or contract, except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule to be charges for extras, as set forth in said proposal, contract and specifications.

V.

That on the 9th day of August, 1916, and after the original proposal, plans and specifications for the erection of said bridge had been submitted by plaintiff and accepted by defendant, said defendant was advised that through an appropriation by the United States Government to be disbursed through the Commissioner of Indian Affairs, there would be available for the construction of said bridge, and in addition to the sum appropriated by defendant, the sum of $15,000.00. This sum was, however, available upon condition, as plaintiff is advised, that the original plans and specifications so submitted by plaintiff should be changed and altered in a manner so as to permit the construction of a stronger structure, and in a manner to be approved by the Commissioner of Indian Affairs. That it was not, however, at this time known, either to plaintiff or to defendant, the exact nature of such changes nor the expense which would be incident thereto, for which reason, plaintiff alleges, it was agreed (or should have [24] been agreed) between plaintiff and defendant, that such changes as were, for this reason, required to be made, should be paid for as extras, according to the price and terms of that portion of complainant's contract hereinabove in paragraph II of this complaint particularly referred to and set forth, and plaintiff, relying upon this understanding and agreement so had with defendant, completed said bridge in compliance, in all respects, with his con-

tract and agreement, at an expense to him, over and above the original contract price of $23,800.00, of the sum of $13,973.65, which sum, plaintiff alleges, became and was a necessary expenditure by reason of the changes directed by defendant as aforesaid, in the construction of said bridge with superstructure and approaches.

VI.

That upon the completion of said bridge by plaintiff, on or about the 3d day of December, 1917, plaintiff presented to defendant, through its Board of Supervisors, statement of the amount due him on account of labor and materials performed and supplied for the construction of said bridge under the conditions hereinabove set forth, showing a balance due from defendant to plaintiff of the sum of $13,973.65. That on said date defendant, through its Board of Supervisors, rejected the claim of plaintiff so presented and refused and still does refuse to pay the said sum of $13,973.65, or any part thereof.

VII.

Plaintiff alleges that subsequent to the 9th day of August, 1916, defendant, its officers and agents, entered into a series of conferences with representatives of the Indian Department of the United States Government for the purpose of determining what changes and alterations from the [25] original plans and specifications submitted by plaintiff would be made necessary so as to meet the requirements of the Indian Department and permit de-

fendent to avail itself of the $15,000.00 so as in this complaint alleged, appropriated by said Indian Department. That by reason of such acts on the part of defendant, its officers and agents, plaintiff was prevented from entering upon the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original specifications, and was delayed in the commencement of said work during the year 1916 and subsequent to the 9th day of August, until the year 1917; that such delay ensuing and so caused, as aforesaid, was without the fault of plaintiff and resulted in preventing plaintiff from entering upon the construction of said bridge during the period, in the years 1916 and 1917, when through the absence of flood waters in the Little Colorado River, said bridge could have been constructed at a minimum cost. That the expense incident thereto was not provided for in the contract hereinabove set forth, as would have been the case had plaintiff known that such delays would have ensued, and that by reason of such delays, through the interference of flood waters and increase in the cost of material, plaintiff, in addition to the sum of $13,973.65, hereinabove in this complaint claimed as the actual cost of extra material, was compelled to expend and did expend the further sum of $3,216.00, the payment of which sum plaintiff alleges was and now is justly due him from defendant.

VIII.

That on the 3d day of December, 1917, plaintiff

accepted from defendant the sum of $6,204.62 on account of the amount so due him as aforesaid. That said sum was accepted by plaintiff under protest, and with the knowledge [26] on the part of defendant that plaintiff was dissatisfied with such amount, and with the reservation on the part of plaintiff of his right to sue for the further sum of $17,189.65, being the balance due him under and by the terms of said contract. That said sum of $6,204.62 was paid by defendant to plaintiff on account of his contract on Little Colorado River bridge, together with extras therein listed, the items of which were at the time of the allowance of said sum annexed to the claim and voucher therefor. That it was understood and agreed between plaintiff and defendant that the acceptance by plaintiff of the warrant for such sum of $6,204.62 should not be by defendant paid or by plaintiff received in liquidation or settlement of the amount claimed to be due him under the terms of his said contract.

X.

Plaintiff alleges that there is now due and owing to him from defendant on account of said contract the sum of $17,189.65, with legal interest thereon from the 3d day of December, 1917.

WHEREFORE plaintiff prays judgment against defendant in the sum of $17,189.65, together with interest as herein stated, and for costs of suit.

GEORGE J. STONEMAN,
Attorney for Plaintiff,
406 Goodrich Blk., Phoenix, Ariz.

[Endorsed]: Complaint. Filed Dec. 2d, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [27]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

IN LAW—No. 56.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

ANSWER.

Comes now the above-named defendant, Navajo County, by its attorneys, the County Attorney of Navajo County, C. H. Jordan, and Clark & Clark, and files the following Motion, Plea and Answer to plaintiff's complaint herein.

I.

MOTION TO STRIKE.

1. Defendant moves the Court to strike from the record the entire complaint of plaintiff and to dismiss said complaint, for the reason that said complaint does not state facts sufficient to constitute any ground of action against this defendant.

2. Without waiving said motion to strike, but expressly reserving and relying upon the same,

this defendant, in case said motion should be denied, moves the Court to strike from said complaint the following language occurring in Paragraph III in said bill of complaint, to wit:

> "and in addition thereto it was provided by the terms of said contract that the extra substructure of said bridge was to be paid for 'as per *addenda*' for extras upon the proposal accepted."

for the reason that said words and language are irrelevant, redundant, [28] frivolous and immaterial and are shown in the contract, a copy of which is included in said bill of complaint, to have no foundation in said contract.

3. Defendant further moves that the following words and language occurring in Paragrph IV of said complaint be stricken therefrom, to wit:

> "and from time to time during the performance of labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to and required of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras, as set forth in said proposal, contract and specifications,"

for the reason that said words and language are irrelevant, redundant, superfluous and immaterial, and appear by reference to the remainder of said complaint to have no foundation therein or in the said contract.

4. Defendant further moves that all of the allegations contained in Paragraph V of said complaint be stricken from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevant, redundant and frivolous.

5. Defendant further moves that all of the allegations of Paragraph VI of said complaint be stricken from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevant, redundant and frivolous.

6. Defendant further moves that all of the allegations of Paragraph VII of said complaint be stricken from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevant, redundant and frivolous.

7. Defendant further moves that all of the allegations contained in Paragraph VIII of said complaint be stricken [29] from said bill, for the reason that the same and all thereof is wholly immaterial, irrelevent, redundant and frivolous.

C. H. JORDAN,
E. S. CLARK,
Attorneys for Defendant.

II.

PLEA IN BAR.

Further answering said complaint, by way of plea in bar, defendant alleges that it apears on the face

of said complaint, and is a fact, that plaintiff's alleged cause of action, and each and every part thereof, accrued more than six months prior to the bringing and commencement of this action, for the reason that plaintiff's alleged claim against the defendant, Navajo County, for the sum of Fifteen Thousand and Forty ($15,040.00) Dollars, was filed with and presented to the Board of Supervisors of said Navajo County, on or before the first day of October, 1917; that on said first day of October, 1917, the said Board of Supervisors, being then regularly in session, deferred action upon said demand until the fifth day of November, 1917; that upon said last-mentioned date, the said Board of Supervisors being then regularly in session took said demand under consideration, and after fully considering the same, rejected the said demand and all thereof; that at the same time another demand against said county in the sum of Seventeen Thousand Seven Hundred and Seventy-Six ($17,776.00) Dollars was presented to said Board of Supervisors, and was thereupon by said Board considered, rejected and disallowed; that both of said demands purported to be the demands of the plaintiff against said defendant for the construction of the bridge mentioned and described in plaintiff's complaint, and for labor and material [30] incident to said construction. That pursuant to the provisions of Paragraph 2439 of the Revised Statutes of Arizona for the year 1913, said alleged cause of action of plaintiff, and all thereof, is barred by limitation, inasmuch as plain-

tiff wholly failed and neglected to sue the defendant upon said claim within six months after final action had been taken by said Board of Supervisors, as above set forth. That this action was not filed until on or about the 2d day of December, 1919.

Further answering said complaint, by way of plea in bar, defendant alleges: That on the 3d day of December, 1917, complainant presented a duly verified demand against defendant for the sum of Six Thousand Two Hundred Four Dollars and Sixty-two Cents ($6,204.62), which demand is in the words and figures following, to wit:

"Holbrook, Arizona, Dec. 3, 1917.

Mesmer & Rice present this demand on the County of Navajo for the sum of Sixty-two hundred & four and 62/100 Dollars, balance due to complete the amount of $23,800.00 on contract of Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

Items of the Foregoing Demand.

Contract price	$23,800.00	
Labor drilling holes	27.14	
1958.4# reinforcing steel ...	137.08	
Labor furnished engineer ...	31.40	
		23995.62
Less.		
Previous payments	17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		6204.62

"Note: This demand must be signed and sworn to before some officer authorized to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do hereby solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that every particular, unto annexed are true and correct in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

LOUIS F. MESMER. [31]

Sworn to and subscribed before me Dec. 3d, 1917.

R. S. TEEPLE,
Clerk Board of Supervisors,
Notary Public.

My commission expires ——.

DISTRIBUTION.

Demand No. 1.

Warrant No. 426.

Filed Dec. 3d, 1917. R. S. Teeple, Clerk. Board of Supervisors.

Approved and ordered paid for $6204.62. Wi-Colo Bridge fund Dec. 3d, 1917.

R. C. CRESWELL,
Chairman, Board of Supervisors."

Defendant further alleges that on the same date the defendant issued its warrant to complainant

for the sum of Sixty-two Hundred Four Dollars and Sixty-two Cents in full and unconditional payment of said demand, which said warrant was thereafter presented by complainant to the County Treasurer of Navajo County and by him paid in full, on the 30th day of March, 1918; that said warrant was issued by defendant and accepted by complainant as in full and complete payment, satisfaction and discharge of all demands of every kind and character of complainant against defendant pertaining to, connected with, or arising out of the construction of said bridge pursuant to said contract, as well as for all extras, additions and modifications claimed by or due to the complainant in connection with or arising out of said construction; that said sum of Sixty-two Hundred Four Dollars and Sixty-two Cents constituted the full and entire balance then due or ever to become due to complainant for said construction or in connection therewith or incidental thereto; that by reason of the premises, the complainant has been fully paid and satisfied for said construction, together with all additions and modifications. Defendant denies that said warrant was ever accepted by complainant under protest [32] and with a reservation of a right to sue for a further sum of Seventeen Thousand One Hundred Eighty-nine Dollars and Sixty-five Cents ($17,189.65), and denies that it was accepted subject to any condition or reservation whatsoever, but defendant alleges, on the contrary, that it was accepted as in full, final and complete payment for all work and material

performed or used in connection with the construction of said bridge; defendant specifically denies that at the time said warrant was issued there was any agreement or understanding between the parties hereto other than that said warrant was issued by defendant and accepted by complainant as in full, final and complete settlement of all demands of every kind and nature of the complainant against the defendant.

WHEREFORE, defendant prays judgment that plaintiff's said cause of action be barred; that plaintiff take nothing by his said action, and that defendant recover its costs herein expended.

E. S. CLARK,
C. H. JORDAN. [33]

III.

ANSWER.

Comes now the defendant above named and answers plaintiff's complaint on file herein as follows:

1. Defendant denies that any contract was ever entered into between plaintiff and defendant for the construction of a bridge across the Little Colorado River which was subject to the approval as to contract, specifications and plans of the United States Indian Department, but alleges, on the contrary, that all such matter as would tend to render said contract, plans or specifications subject to the approval of the United States Indian Department was eliminated from the contract at the special instance and request of the plaintiff himself, and that the alleged copy of said contract appearing in said complaint, in so far as it pur-

ports to set forth a stipulation that the plans, specifications and form of contract were subject to the approval of the United States Indian Department, is erroneous, and not supported by said original contract, as signed by the parties hereto. Defendant denies that at the time said contract of September 5th, 1916, was entered into between the parties hereto, the exact nature of changes requested by the Commissioner of Indian Affairs was uncertain or unknown, and denies that the expense, if any, incident to such changes was unknown, but alleges, on the contrary, that at the time said contract was made on said last-mentioned date the request, if any, made by the said Commissioner of Indian Affairs were definitely ascertained and understood by both the plaintiff and defendant, and that there was no misunderstanding, uncertainty or ambiguity as to what would be required of plaintiff under said contract at the time it was made, and that the plaintiff entered upon the performance of said contract with definite and exact knowledge of each and every [34] requirement pertaining to said construction. Defendant further denies that it ever directed any such changes in or departure from the original contract for the construction of said bridge as imposed upon the plaintiff any expense over and above the original contract price, and denies that any changes were made in said contract that imposed upon plaintiff an additional expense of Thirteen Thousand Nine Hundred Seventy-three Dollars and Sixty-five Cents or any other sum, or any additional expense whatsoever.

2. Defendant further denies that plaintiff was ever prevented by its act, order or request, or by the act, order or request of any officer or agent authorized to speak or act for the defendant, from entering upon the construction of said bridge, and denies that it ever directly or through any authorized officer or agent prevented, delayed or interfered with the plaintiff in ordering material, supplies and equipment contemplated in the original specifications of said contract, and denies that the plaintiff was ever delayed in the commencement of said work during the year 1916 or at any time, and denies that plaintiff was delayed at all by or on account of any act or omission of defendant, but alleges, on the contrary, that if any delay occurred in the commencement of the work upon said bridge or the prosecution thereof, it was due wholly and entirely to the negligence and omissions of the plaintiff himself, and that if any cost or expense has been occasioned by delay in the commencement by plaintiff of said work, or in the prosecution thereof, it is due entirely and exclusively to the procrastination and dilatory methods of plaintiff and not to any act, direction, request or omission of the defendant.

3. Defendant further alleges that plaintiff is not entitled under said contract to any compensation, bonus or excess over and above the said contract price of Twenty-three Thousand Eight Hundred ($23,800.00) Dollars, on account of any [35] alleged delay in the commencement or prosecution of the construction of said bridge for the reason

that it is expressly provided in the contract set forth in plaintiff's complaint, that:

> "Should the party of the second part be obstructed or delayed in the prosecution or completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work, shall be extended for a period equivalent to the time lost by reason of one or more of the causes aforesaid."

That the party of the second part took and was given as much time beyond the contract period of six months from the date of the contract as he desired, all of which excess time was due not to any act, mistake, default of omission on the part of the party of the first part, but was wholly due to the dilatory methods, procrastination and lack of diligence on the part of the party of the second part.

Defendant denies that plaintiff ever expended the sum of Three Thousand Two Hundred and Sixteen ($3,216.00) Dollars on account of delay, as set forth in Paragraph VII of his complaint, and denies that he expended any sum whatever for cost of extra material by reason of any act, omission, mistake or direction of the defendant.

4. Defendant alleges that on the 3d day of December, 1917, complainant presented a duly verified demand against defendant for the sum of Six Thousand Two Hundred Four Dollars and Sixty-two Cents ($6,204.62), which demand is in the words and figures following, to wit:

"Holbrook, Arizona, Dec. 3, 1917.

Mesmer & Rice present this demand on the County of Navajo for the sum of Sixty-two Hundred & four and 62/100 Dollars, balance due to complete the amount of $23,800.00 on contract of Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

Items of the Foregoing Demand.

Contract price	$23,800.00	
Labor drilling holes	27.14	
1958.4# reinforcing steel ...	137.08	
Labor furnished engineer ...	31.40	
		23995.62
Less. [36]		
Previous payments	17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		6204.62

Note: This demand must be signed and sworn to before some officer authorized to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do hereby solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct

in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

LOUIS F. MESMER.

Sworn to and subscribed before me Dec. 3d, 1917.

R. S. TEEPLE,
Clerk of the Board of Supervisors,
Notary Public.

My commission expires ———.

DISTRIBUTION.

Filed Dec. 3d, 1917, R. S.Teeple, Clerk, Board of Supervisors.

Approved and ordered paid for $6204.62 Wi-Colo Bridge fund Dec. 3d, 1917.

R. S. CRESWELL,
Chairman, Board of Supervisors."

Defendant further alleges that on the same date the defendant issued its warrant to plaintiff for the sum of Sixty-two Hundred and Four Dollars and Sixty-two Cents in full and unconditional payment of said demand, which said warrant was thereafter presented by plaintiff to the County Treasurer of Navajo County, and by him paid in full, on the 30th day of March, 1918; that said warrant was issued by defendant and accepted by plaintiff as in full and complete payment, satisfaction and discharge of all demands of every kind and character of plaintiff against defendant pertaining to, connected with, or arising out of the construction of said bridge pursuant to said contract, as well as for all extras, additions and modifications

claimed by or due to the plaintiff in connection with or arising out of said construction; that said sum of Sixty-two Hundred Four Dollars [37] and Sixty-two Cents constituted the full and entire balance then due or ever to become due to plaintiff for said construction or in connection therewith or incidental thereto; that by reason of the premises, the plaintiff has been fully paid and satisfied for said construction, together with all additions and modifications. Defendant denies that said warrant was ever accepted by plaintiff under protest and with a reservation of a right to sue for a further sum of Seventeen Thousand One Hundred Eighty-nine Dollars and Sixty-five Cents ($17,129.65), and denies that it was accepted subject to any condition or reservation whatsoever, but defendant alleges, on the contrary, that it was accepted as in full, final and complete payment for all work and material performed or used in connection with the construction of said bridge. Defendant specifically denies that at the time said warrant was issued there was any agreement or understanding between the parties hereto other than that said warrant was issued by defendant and accepted by plaintiff as in full, final and complete settlement of all demands of every kind and nature of the plaintiff against the defendant.

4. Defendant denies that it is indebted to plaintiff in any sum whatsoever, and denies that it is in debted to plaintiff at all. Defendant further denies each and every, all and singular, the allegations of

plaintiff's complaint, except as such allegations may be herein admitted, modified or qualified.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by his said action, and that defendant recover its costs herein.

E. S. CLARK,
C. H. JORDAN,
Attorneys for Defendant.

[Endorsed]: Answer. Filed March 8, 1920. C. R. McFall, Clerk. [38]

Regular March, 1920, Term, at Prescott.

In the United States District Court, in and for the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of March 22d, 1920.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 22, 1920—ORDER RE DEMURRER.

The matter of the defendant's motion to strike heretofore filed herein coming on regularly for

hearing this day, comes now E. S. Clark, Esq., on behalf of the defendant, and George J. Stoneman, Esq., on behalf of the plaintiff:

IT IS ORDERED by the Court that the defendant later during the day be permitted to file herein a special demurrer setting up the Statute of Limitations in bar of this action, and that the same be now considered by the Court, as filed, and the Court, having heard arguments of counsel concerning said special demurrer, now orders the same overruled. (To which ruling of the Court, the defendant in open court, then and there duly excepted.)

Further argument was then had by counsel upon defendant's motion to strike, and it was ordered by the Court that the words "or should have been agreed" found in line 32 on page 8 of the complaint herein, be stricken out; the remaining grounds of said motion to strike were submitted to the Court and by the Court taken under advisement.

IT IS FURTHER ORDERED by the Court that the defendant be permitted to file herein an additional demurrer, and a motion to make more definite and certain. [39]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

DEMURRER.

Comes now the defendant herein, and by leave of Court first had and obtained, demurs to the plaintiff's complaint on file herein upon the following grounds:

I.

Defendant demurs to the cause of action attempted to be set forth in Paragraphs V and VI of plaintiff's complaint, for the reason, that the allegations thereof do not state facts sufficient to constitute any cause of action against defendant.

II.

Defendant demurs to the cause of action attempted to be set forth in Paragraph IV of plaintiff's complaint, for the reason that the allegations of said paragraph do not state facts sufficient to constitute any cause of action whatsoever against defendant.

III.

Defendant demurs to the plaintiff's complaint

upon the ground, that it appears upon the face thereof, that the cause of action attempted to be set forth therein, accrued on the fifth day of November, 1917, and that this action was not brought until more than six (6) months thereafter, and by reason of the premises, plaintiff's alleged cause of action is barred by limitations. [40]

IV.

Defendant demurs to plaintiff's complaint as a whole, for the reason that said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and the several causes of action attempted to be set forth therein, and for its costs.

E. S. CLARK,
C. H. JORDAN,
Attorneys for Defendant.

[Endorsed]: Demurrer. Filed March 23, 1920. C. R. McFall, Clerk. [41]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

No. L–56—PRCT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

MOTION TO MAKE MORE DEFINITE AND CERTAIN.

Comes now the defendant above named, and respectfully moves the Court to require the plaintiff to make his complaint more definite and certain in the following particulars, to wit:

I.

That plaintiff make the allegations of Paragraph IV more definite and certain by stating what officers and agents of defendant, if any, proposed to, and required of the plaintiff that certain changes and alterations be made in the original specifications; when such changes and alterations were required, and what said changes and alterations consisted of.

II.

That plaintiff make the allegations of Paragraph V more definite and certain by stating when it was agreed between plaintiff and defendant that the original plans and specifications should be changed and altered in the manner so as to permit the construction of a stronger structure, and whether such change was directed in writing, and what such change or alterations consisted of; that plaintiff also be required to state the items of expense he incurred in making up the sum of Thirteen Thousand Nine Hundred and Seventy-three and 65/100 Dollars, ($13,973.65), which he claims in said Paragraph V to have expended over and above the contract price of Twenty-three Thousand Eight Hundred Dollars ($23,800.00) by reason of changes di-

rected by the defendant in the construction of the bridge. [42]

III.

That plaintiff be required to make the allegations of Paragraph VI of his complaint more definite and certain by setting forth a copy of the demand, or statement, alleged in said paragraph to have been presented to defendant on or about the third day of December, 1917, for the sum of Thirteen Thousand Nine Hundred Seventy-three and 65/100 Dollars ($13,973.65).

IV.

That plaintiff make the allegations of Paragraph VII more definite and certain by stating by what officer of the defendant, he was prevented from entering on the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original plans and specifications; whether such direction was oral or in writing and when such direction was given, how long, if at all, plaintiff was delayed by such instructions in commencing work upon said bridge.

V.

That plaintiff make the allegations of Paragraph VIII of his complaint more definite and certain, by stating whether he filed a demand in writing and under oath, against the defendant, for the sum of Six Thousand Two Hundred and Four and 62/100 Dollars ($6,204.62), alleged by him to have been accepted from the defendant on the third day of

December, 1917, and that he set forth a copy of said demand.

E. S. CLARK.
C. H. JORDAN.

[Endorsed]: Motion to Make More Definite and Certain. Filed: March 23, 1920. C. R. McFall, Clerk. [43]

Regular November Term, 1921, at Tucson.

In the United States District Court in and for the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of Saturday, April 24th, 1922.)

No. L–56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—APRIL 24, 1922—ORDER RE MOTION TO MAKE MORE DEFINITE AND CERTAIN.

The defendant's motion to strike herein, upon consideration thereof, IT IS ORDERED that it be and hereby is overruled.

IT IS FURTHER ORDERED that the first, second and fourth grounds of the defendant's motion to make more definite and certain be and they are hereby sustained; and that the third and fifth grounds of said motion be and they are hereby overruled.

IT IS ORDERED that the demurrer herein be passed because of the ruling of the Court sustaining certain of the defendant's motions to make more definite and certain.

IT IS FURTHER ORDERED that the plaintiff herein be given ten days from receipt of notice of this order to amend his complaint, and the defendant is given ten days from the receipt of notice of the filing of said amended complaint, to answer thereto. [44]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

No. 56—IN LAW.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of Mesmer & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

AMENDED COMPLAINT.

Comes now Louis F. Mesmer, an individual, doing

business under the name and style of Mesmer & Rice, leave of Court being first had and obtained, and files this his amended complaint, and complaining of Navajo County, defendant above named, for cause of action alleges:

I.

That the plaintiff now is and at all times hereinafter mentioned has been a citizen of the United States and an inhabitant and resident and citizen of the southern district of California; and that defendant, Navajo County, is a political subdivision of the State of Arizona, and is included within the Prescott Division of the District Court of the United States, for the District of Arizona.

II.

That the amount in controversy in this suit exceeds the sum of three thousand dollars, exclusive of interest and costs, and that the jurisdiction of this Honorable Court depends upon diversity of citizenship of plaintiff and defendant.

That on the 5th day of September, 1916, and for a long time prior thereto, this plaintiff under the name and style of [45] Mesmer & Rice, was a contractor engaged in the business of erecting bridges, and in response to an invitation and call for bids prior to the 5th day of September, 1916, advertised by defendant for the construction of certain bridges for which appropriations had been theretofore made by defendant, plaintiff submitted to defendant his bid for the construction of certain bridges to be erected by the defendant and particularly for that certain bridge to be erected by de-

fendant across the Little Colorado River near Winslow, Arizona, hereinafter referred to as Contract #1, Bridge T–3, and that said bid was accompanied by specifications prepared by plaintiffs and a proposal to erect and construct said bridge T–3 for certain sums, dependent upon the design and construction desired by defendant, among which specifications was a proposal to construct said bridge according to specifications therewith submitted for the sum of $23,800.00 Said proposal contained a provision designed by the plaintiff and intended by plaintiff to be understood by defendant to cover extras and additional quantities of material which might be by defendant required or designated to be used, which provision is in words and figures as follows, to wit:

"If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place...$20.00 per yd.
(b) Additional structural steel in place ..... 7.5¢ " lb.
(c) Additional reinforcing steel in place ..... 7 ¢
(d) All other work will be done on the percentage basis at actual cost plus 15%.

That said proposal containing the provision hereinabove set forth and referred to was in words and figures as follows, to wit:

"We, the undersigned, hereby propose to furnish all materials and all labor, necessary and requisite to perform and complete in a first-class and workmanlike manner the construction of the seven new steel bridges to be built in Navajo County, Arizona, as per General Specifications [46] prepared by Mr. Charles E. Perkins, County Engineer, Holbrook, Arizona, and per specifications and drawings submitted herewith for the following prices for each bridge separately:

Contract #1, Bridge T–3, over Little Colorado River near Winslow as shown on drawing #4183, with 14′ Roadway concrete floor, steel joists, steel railing, resting on steel concrete pier, with number of trusses as shown, with all field connection riveted, all for the sum of.....$ 31,242.00

(a) Regular Design, with three spans as described above

(b) Same as (a) except with wood floor and steel joists, for..... 23,800.00

(c) Same as (a) except with wood floor and wood joists for..... 22,050.00

(d) Same as (a) except with 12′ roadway for..... 28,894.00

(e) Same as (d) except with wood floor and steel joists for..... 21,610.00

(f) Same as (d) except with wood floor and wood joists for..... 20,170.00

(aa) Alternate Design, as described under (a) except five spans.... 25,290.00

(bb) Same as (aa) except with wood floor and steel joists for..... 19,000.00

(cc) Same as (aa) except with wood floor and wood joists for..... 17,200.00

(dd) Same as (aa) except with 12′ 0″ roadway for..... 24,520.00

(ee) Same as (dd) except with wood floor and steel joists for..... 18,400.00

(ff) Same as (dd) except with wood floor and wood joists for 17,030.00

(g) For wood railing instead steel railing deduct..... 500.00

(h) For bolting field connections instead of riveting deduct..... 250.00

(j) For concrete web between steel cylinders, add ..... 25.00 per yd

If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:

(a) Additional concrete in place..... 20.00 per yd

(b) Additional structural steel in place. 7.5¢ per lb.

(c) Additional reinforcing steel in place 7¢ per lb.

(d) All other work will be done on the percentage basis at actual cost plus 15%.

All the above proposals, while bid on separately, are for all seven bridges and cannot be accepted for any one bridge. If, however, we are low bidder on 75% or 80% of the work; we will entertain a proposition from your Honorable Board, but it is our in-

tention to do all of the work and we have bid accordingly.

Respectfully submitted,

MESMER & RICE.

By LOUIS F. MESMER.

Holbrook, Arizona, July 1st, 1916." [47]

That on the 7th day of August, 1916, the Board of Supervisors of Navajo County defendant above named having regularly convened for the purpose of acting upon the proposals and specifications submitted by plaintiff for the erection of the bridge mentioned, made and entered its order that the bid of plaintiff submitted under the firm name of Mesmer & Rice of Los Angeles California being the lowest and best bid received for the construction of the bridge across the Little Colorado River, near Winslow, at a cost of $23,800.00, the same was accepted and approved subject to approval of contract, specifications and plans therefor by the United States Indian Department, which Department was to pay one half the costs of the construction of said bridge; and that thereafter, pursuant to said order, entered into a contract and agreement with plaintiff, under and by the terms of which plaintiff was authorized to enter upon the construction of said bridge T–3, for the sum of $23,800.00; and in addition thereto it was provided by the terms of said contract that the extra sub-structure of said bridge was to be paid for "as per *addenda* for extras upon the proposal accepted."

Such contract is in words and figures as follows, to wit:

"This agreement, made and entered into this 5th day of September, A. D. 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part, and Louis F. Mesmer, doing business under the name of Mesmer & Rice, of Los Angeles, California, the party of the second part,

WHEREAS the party of the first part heretofore advertised for bids for the construction and building of certain bridges and,

WHEREAS said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the 3rd day of July, A. D. 1916, for the constructing and building of the bridge hereinafter mentioned, and

WHEREAS the party of the second part submitted bid for construction and building said bridge, and, [48]

WHEREAS, the said bid of the party of the second part appears *to the* lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and,

WHEREAS, for the purpose of identification and to set forth more fully the provisions and stipulations of this contract, said call for bids with specifications for such bridge is hereto attached and made a part hereof, and

WHEREAS, for the same purposes the said bids are hereto attached, and made a part hereof, and

WHEREAS the said party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described,

for the sum of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars,

NOW, THEREFORE, the said party of the second part has agreed and by these presents does agree to and with the party of the first part, for and in consideration of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars, to furnish all the materials and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications designated and attached hereto and made a part hereof, to construct and erect the following bridge, upon the site herein named to wit:

Bridge T–3, over Little Colorado River, east of Winslow.

Superstructure: 3–165′, riveted H. T. steel spans as per superstructure plan on drawing No. 4183; substructure to be as follows (as per *addenda* for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8′ in diam., filled with a rich concrete resting upon twelve piles driven to a refusal of a fifteen tons load each; the upper steel cylinder *be* fifteen feet in length or such that its upper end will be level with a point two feet above the bottom chord of the adjoining A. T. & S. F. R. R. Bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be 6 ft. in diam. and filled with a rich concrete mixture connected with the lower concrete by 12 1″ twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18″ reinforced concrete wall of an equal length with the said upper

cylinders and abutments to consist of two thirty foot steel cylinders each, six feet in diam. filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall.

It is further agreed that in the event of any changes being made by the party of the first part, or any extras required by the party of the first part, such charges of extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore [49] described, according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party of the second part, in constructing said bridge in accordance with Clause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part, at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the

aforesaid bridge shall be made immediately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law ~~except part to be paid by U. S. Government is to be paid according to custom of Indian Department in contracts of this kind as regards time of payment.~~

R. C. C.
Geo. W. H.
Q. R. G.

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

It is also stipulated that as evidence of good faith in the performance of this contract, the said Louis F. Mesmer will furnish and give to the party of the first part good and sufficient bond in the penal sum of six thousand dollars.

The party of the second part shall provide sufficient safe and proper facilities at all times for the inspection of the work by the party of the first part, or its agent, and shall within twenty-four hours after receiving written notice from the party of the first part, or its agent, to that effect, proceed to remove from the grounds all materials which may be condemned, whether worked or unworked, and to tear down all portions of the work which may be condemned by the party of the first part or its agent, as unsound or improper, or in any way failing to conform to the plans and specifications hereinbefore mentioned, and it is understood that the party of the first part will at all times have an inspector present during the progress of the work on the bridge here-

inbefore mentioned, and if not, this clause in this contract is null and void.

Should the party of the second part be obstructed or delayed in the prosecution or completion of the work by the act, mistake or default of the party of the first part, through no fault of the party of the second part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The party of the second part agrees and stipulates that if he shall delay the material progress of the work so as to cause any damage for which the party of the first [50] part may become liable, or perform any other act for which the party of the first part may become liable, then and in that event the party of the second part shall make good to the party of the first part any such damage.

If at any time there shall be evidence of any lien or claim for which, if established, the party of the first part might become liable, and which is chargeable to the party of the second part, the party of the first part shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify it against such lien and claim, and should there prove to be any such claim, after all payments are made, the party of the second part shall refund to the party of the first part all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the default of the party of the second part.

It is further mutually agreed by and between the parties hereto that no certificate given nor payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper materials.

It is also understood and agreed that A & B company Standard Specifications for highway bridges have been and are hereby adopted as the general reference for the construction of the bridge mentioned herein.

~~It is also hereby stipulated that the plans, specifications~~ and form of contract for the building of the bridge hereinbefore specified, are subject to the approval of the United States Indian Department, R. C. C. Geo. W. H. and that this contract is not fully binding until the Congressional appropriation of fifteen thousand and no/100 ($15,000.00) dollars for said bridge is available for use in the ~~construction of said bridge.~~

The said parties for themselves, their successors and assigns, heirs, administrators and executors, do hereby agree to the full performance of the covenants herein contained, and conform to the specifications and plans hereto annexed and made a part hereof, except where either of same may be changed in accordance with the provisions hereinbefore mentioned.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands the day and year first above written.

NAVAJO COUNTY,
By R. C. CRESWELL,
Chairman.
GEO. W. HENNESSEY,
Member,
Q. R. GARDNER,
Member,
Board of Supervisors.
[Seal] Attest: DEE M. MOSS,
Clerk, Board of Supervisors.
LOUIS F. MESMER,
Doing Business Under Name of Mesmer & Rice."

[51]

IV.

Plaintiff alleges that as hereinabove set forth he entered into said contract on the 5th day of September, 1916, and immediatey thereafter commenced the construction of said bridge according to the terms and specifications of said contract; that on or about the 9th day of August, 1916, plaintiff was informed by C. E. Perkins, the then County Engineer of defendant, acting in its behalf by and with authority of the Board of Supervisors of said defendant, that there would be available for the construction of said bridge the sum of fifteen thousand ($15,000.00) dollars, being a portion of the amount appropriated by the Indian Department of the Federal Government, provided that certain changes should be made in the specifications theretofore by

plaintiff submitted, so that said construction should fulfill the requirements of the Indian Service; that said requirements were not at said time known, either to plaintiff or defendant, and for this reason it was agreed and understood between plaintiff and the said C. E. Perkins, and also by the Board of Supervisors of said defendant, that the changes in the construction and specifications which might be required to be made in order to fulfill the requirements of the Indian Service should be paid for as extras at the rates and prices provided for in the *addenda* both to the specifications and the contract; that from time to time subsequent to the 5th day of December, 1916, and during and including the time up to the completion of said bridge changes so required were made with the knowledge of defendant, acting through its County Engineer and its Board of Supervisors, and that such changes and alterations consisted of the use of additional material; in the thickness of the steel cylinders, and also in the top and bottom chords and in the lower lateral bracing, all of which necessitated the use of materials and [52] labor as hereinafter in this complaint set forth, and all of which plaintiff alleges it was understood and agreed should be paid for as extras.

V.

Plaintiff alleges that changes hereinbefore required to be made in the original plans and specifications, which prior to the 9th day of August, 1916, had been submitted by plaintiff and accepted by defendant, were agreed to be made on and subsequent to the 9th day of August, 1916; that it was further

agreed between plaintiff and the County Engineer of Navajo County, acting by and with the consent, knowledge and authority of defendant through its Board of Supervisors; that the sum of $15,000.00 appropriated by the United States Government to be disbursed through the Commissioner of Indian Affairs would be available for the construction of said bridge in addition to the sum appropriated by defendant; that it was not known on said 9th day of August, either by plaintiff or defendant, what changes if any might be required to be made by the Commissioner of Indian Affairs for which reason plaintiff alleges it was agreed between plaintiff and defendant, acting through its board of Supervisors and County Engineer, that such changes as might be required in order to make said sum of $15,000.00 available, should be paid for as extras and be furnished at prices designated in the proposal attached to said contract in accordance with the terms thereof in the following words:

"If, after construction has started, it becomes apparent that additional quantitles are required, we hereby propose to furnish

(a) Additional concrete in place....$20.00 per yd.
(b) " structural steel in place 7.5¢ " lb.
(c) " reinforcing steel in place ..... 7. ¢ " "
(d) All other work will be done on a percentage basis at actual cost plus 15%."

That such changes were directed partly in writing and partly in parol by the said County Engineer and

by the Superintendent of [53] Construction of the Indian Service, acting in conjunction with said County Engineer; that plaintiff, relying upon the understanding and agreement so had with defendant, both as set forth in said written contract and as understood and agreed between plaintiff and defendant, its officers and agents, on or about the 9th day of August, 1916, completed said bridge in compliance in all respects with its contract and agreement, at an expense to him over and above the original contract price of $23,800.00 of the sum of $13,973.65, which sum plaintiff alleges became and was a necessary expenditure by reason of the changes directed by defendant as aforesaid in the construction of said bridge with superstructure and approaches in a manner so as to comply with the requirements of the Indian Service, and make available to defendant the appropriation by the Federal Government of the sum of $15,000.00; that the items of expense incurred in making said changes are as follows, to wit:

Extras required by Mr. Perkins & U. S. Govt.—

Cylinder steel, 63,278#—7½¢	4,745.00
Superstructure steel, 7740#—7½¢	580.00
Reinforcing—bonding upper and lower cylinders, 1960#—7¢	137.20
Reinforcing—in web walls, 1235#—7¢	86.45
Extra Concrete—in cylinders 236 yds.—$20	4,720.00
Extra Concrete—in web walls 29 yds.—$25	725.00
Extra piling, 44 piles—$15	660.00

Extra excavation, 136 yds.—$5..... 680.00
Extra work and material required by Inspector—
Drilling holes..... 27.14
Reinforcing, 1958.4#..... 137.08
Labor furnished Engineer..... 31.40
Additional length of Piling required by Board—
Original estimate based on Piling 16′ long, 1640′—$1.00.....1,640.00

VI.

That upon the completion of said bridge by plaintiff, on or about the 3d day of December, 1917, plaintiff presented to defendant, through its Board of Supervisors, statement of the amount due him on account of labor and materials performed and [54] supplied for the construction of said bridge under the conditions hereinabove set forth, showing a balance due from defendant to plaintiff of the sum of $13,973.65. That on said date defendant, through its Board of Supervisors, rejected the claim of plaintiff so presented and refused and still does refuse to pay the said sum of $13,973.65, or any part thereof.

VII.

Plaintiff alleges that subsequent to the 9th day of August, 1916, and during a period of more than four months thereafter, defendant, through its Board of Supervisors and County Engineer, entered into a series of conferences with representatives of the Indian Department of the United States Government for the purpose of determining what changes and alterations from the original plans and specifications submitted by plaintiff would be made necessary so

as to meet the requirements of the Indian Department and permit defendant to avail itself of the $15,000.00 so as in this complaint alleged, appropriated by said Indian Department. That by reason of such acts on the part of defendant, its officers and agents, plaintiff was prevented from entering upon the construction of said bridge, or from ordering material, supplies and equipment contemplated in the original specifications, and was delayed in the commencement of said work during the year 1916 until December 26th, 1916; that such delay ensuing and so caused, as aforesaid, was without the fault of plaintiff and resulted in preventing plaintiff from entering upon the construction of said bridge during the period, in the years 1916 and 1917, when through the absence of flood waters in the Little Colorado River, said bridge could have been constructed at a minimum cost. That the expense incident thereto was not provided for in the contract hereinabove set forth, as would have been the case had plaintiff known that such delays would have [55] ensued, and that by reason of such delays, through the interference of flood waters and increase in the cost of material, plaintiff, in addition to the sum of $13,973.65, hereinabove in this complaint claimed as the actual cost of extra material, was compelled to expend and did expend the further sum of $3,216.00, the payment of which sum plaintiff alleges was and now is justly due him from defendant; that the changes and alterations so made were directed partly in writing and partly in parol.

VIII.

That on the 3d day of December, 1917, plaintiff accepted from defendant the sum of $6,204.62 on account of the amount so due him as aforesaid. That said sum was accepted by plaintiff under protest, and with the knowledge on the part of defendant that plaintiff was dissatisfied with such amount, and with the reservation on the part of plaintiff of his right to sue for the further sum of $17,189.65, being the balance due him under and by the terms of said contract. That said sum of $6,204.62 was paid by defendant to plaintiff on account of his contract on Little Colorado River bridge, together with extras therein listed the items of which were at the time of the allowance of said sum annexed to the claim and voucher therefor. That it was understood and agreed between plaintiff and defendant that the acceptance by plaintiff of the warrant for such sum of $6,204.62 should not be by defendant paid or by plaintiff received in liquidation or settlement of the amount claimed to be due him under the terms of his said contract.

IX.

Plaintiff alleges that there is now due and owing to him from defendant on account of said contract the sum of $17,189.65, with legal interest thereon from the 3d day of December, 1917. [56]

WHEREFORE plaintiff prays judgment against defendant in the sum of $17,189.65, together with interest as herein stated, and for costs of suit.

GEORGE J. STONEMAN,
Attorney for Plaintiff,
803 H. W. Hellman Bldg, Los Angeles, Cal.

[Endorsed]: Amended Complaint. Filed May 10, 1922. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [57]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, January 14, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JANUARY 14, 1924—ORDER RE MOTION TO DISMISS.

George J. Stoneman, Esquire, appears for the plaintiff. E. S. Clark, Esquire, is present for the defendant.

The defendant having heretofore filed its motion for dismissal of this cause for lack of prosecution, and the Court being fully advised, IT IS OR-

DERED that said motion be and the same is hereby overruled.

By consent of both parties in open court, IT IS ORDERED that this case be transferred to the Phoenix Division of this Court for trial; and IT IS FURTHER ORDERED that this case be set for trial Monday, March 17th, 1924. [58]

Regular October, 1923, Term, at Phoenix.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, March 17th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 17, 1924—TRIAL.

This case comes on regularly for trial this date. The plaintiff, Louis F. Mesmer, is present in person with counsel, George J. Stoneman, Esq.

The defendant, Navajo County is represented by Messrs. Clark & Clark, Esqs., Thorwald Larson, Esq., and C. H. Jordan, Esq. Both sides announce readiness for trial.

D. A. Little is duly sworn as court reporter, on request of the defendant.

The plaintiff asks leave of the Court to amend his amended complaint by interlineation in the fourth paragraph on page 5 at line 14 after the word "bridge" by inserting the words "upon the site herein named." The Court now orders that the amendment by interlineation is permitted.

The plaintiff now asks leave to further amend said complaint by interlineation in line 17 on page 5, by substituting the word "substructure" in the place of the word "superstructure." Thereupon, it is ordered that the word "substructure" be substituted for the word "superstructure." The defendant excepts and the exception is by the Court duly allowed.

The plaintiff further requests leave to amend his amended complaint by interlineation by inserting after the word "resident" in paragraph one the words "and resident." Whereupon, it is ordered that such amendment is allowed. The defendant excepts to the ruling of the Court, and the exception is ordered allowed. [59]

Eighteen jurors are ordered called into the jury-box; whereupon, counsel for the plaintiff announces that it is his understanding that this was to be a nonjury trial; the defendant concurs in said under-

standing, and thereupon, it is stipulated by counsel for both sides in open court that a jury in this case is waived, further announcing that written stipulation waiving jury will be prepared and filed this date. Thereupon, all jurors in attendance are ordered excused until Thursday, March 20th, 1924, at 9:30 A. M.

The plaintiff now makes statement of his case, and the defendant makes statement of its case.

To maintain his case the plaintiff calls witnesses as follows, who are duly sworn and examined:

Wallace Elsworth; said witness is called under the provisions of Section 1680 of the Civil Code of Arizona 1913 for the purpose of cross-examination.

C. H. Jordan.

R. C. Creswell; said witness is called under the provisions of Section 1680 of the Civil Code of Arizona 1913 for the purpose of cross-examination.

C. E. Owens; said witness called under provisions of Section 1680 of the Civil Code of Arizona 1913 for the purpose of cross-examination.

Exhibits are admitted and filed on behalf of the plaintiff as follows:

Exhibit No. 1 (Call for bids).

Exhibit No. 2, offered for identification only.

Exhibit No. 3 (Contract).

Exhibit No. 4 (Report).

Exhibit No. 5 (Telegram).

Exhibit No. 6 (Letter Dept. Interior, Sept. 27, 1916).

Exhibit No. 7 (Letter of Sept. 14, 1916).

Exhibit No. 8 (Letter of May 23, 1918).

Exhibit No. 9 ("Demand," Oct. 1, 1917).

Exhibit 10 ("Demand," Nov. 5, 1917).

Exhibit No. 11 ("Demand," Dec. 3, 1917).

Exhibit No. 12 (Copy of "Demand" dated Dec. 3, 1917).

Exhibit No. 13 ("Nichols Report," Aug. 9, 1916).

Exhibit No. 14 ("Report," of Perkins).

Exhibit No. 15 (Copy telegram May 19, 1918, Stoneman to Creswell).

Exhibit No. 16 (Telegram, Creswell to Stoneman).

Exhibit No. 17 ("Demand," May 21, 1918).

It is now stipulated that Plaintiff's Exhibits No. 8 and No. 17 may be attached together for the purposes of the record.

Thereupon, IT IS ORDERED that this case be recessed until 9:30 o'clock A. M., Tuesday, March 18th, 1924. [60]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, March 18th, 1924.)

No. L-56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 18, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon further trial of this case is resumed.

R. S. Teeple is called, duly sworn and examined on behalf of the plaintiff.

Stipulation is now made between the parties hereto that the record may show the waiver of a jury for the trial of this case. Said waiver of both parties is now ordered by the Court to be entered as made orally before the trial commenced. The stipulation was that the matter be tried without a jury.

Counsel for the plaintiff now states that the witness, R. S. Teeple, was called for examination under the provisions of Section 1680 of the Civil Code of Arizona 1913. IT IS ORDERED by the Court that said witness was so called; to which ruling of the Court the defendant duly excepts.

Exhibits are admitted and filed on behalf of the plaintiff as follows:

Exhibit No. 18 ("Demand" for documentary evidence).

Exhibit No. 19 (Carbon copy of Demand of May 7, 1917).

Exhibit No. 20 (Blue-print plans).

Exhibit No. 21 (Plans).

Louis F. Mesmer, plaintiff herein, is now duly sworn and examined as a witness in his own behalf.

Thereupon, IT IS ORDERED that this case be continued to Wednesday, March 19th, 1924, at 9:30 A. M., for further trial. [61]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Wednesday, March 19, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 19, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon, further trial of this case is now resumed.

Examination of Louis F. Mesmer, plaintiff herein, is resumed.

Defendant's Exhibit "A" is offered and marked for identification.

Defendant's Exhibit "B" is admitted and filed (being "Release").

At plaintiff's request, IT IS ORDERED that deposition of Thomas F. Nichols be opened. Thereupon, the plaintiff reads in evidence the deposition of Thomas F. Nichols.

Plaintiff's Exhibit No. 22 (Nichols Letter) is admitted and filed on behalf of the plaintiff.

Wallace Ellsworth, heretofore sworn, is recalled for further examination.

William H. Popert is called, duly sworn and examined on behalf of the plaintiff.

Thereupon, IT IS ORDERED that this case be continued for further trial to Thursday, March 20th, 1924, at 9:30 A. M. [62]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, March 20th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 20, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon, further trial is resumed.

Examination of Wm. H. Popert is resumed.

Defendant's Exhibit "C" is offered and marked for identification (being "Memo" dated August 12th, 1916).

Defendant's Exhibit "D" (Power of Attorney) is admitted and filed.

Now at the close of plaintiff's case, the plaintiff asks leave of the Court to amend his amended complaint as to paragraphs six and eight to conform to the proof submitted, which request is by the Court granted with the understanding that the defendant may file answer thereto.

Thereupon, the PLAINTIFF RESTS.

The defendant calls the following witnesses in its behalf:

John A. Freeman, sworn and examined.

C. E. Owens, heretofore sworn, is examined.

R. C. Creswell, heretofore sworn, is examined.

Thereupon, IT IS ORDERED that this case be continued to Friday, March 21st, 1924, at 9:30 A. M. for further trial. [63]

In the District Court of the United States for the District of Arizona, Phoenix Division.

No. 56—IN LAW.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

SUBSTITUTE PARAGRAPHS IN AMENDED COMPLAINT.

Leave of Court being first had and obtained, granting to plaintiff permission to file substitute paragraphs for the purpose of making the allegations of the amended complaint filed herein, conform to the proof, plaintiff makes and files the following as substitute paragraphs, in lieu of like numbered paragraphs in said amended complaint:

SUBSTITUTE PARAGRAPH VI.

That on the 5th day of November, 1917, plaintiff presented to the Board of Supervisors of Navajo County, at a meeting of said Board duly and regularly convened and held, a statement of the amount on said date claimed to be due him under the terms of his said contract, on account of labor performed and materials supplied in the construction of said bridge, showing a gross amount then due plaintiff

of $30,400.00, being, as also shown in said demand, eighty per cent (80%) of the total amount due without deducting therefrom the amounts theretofore paid by defendant. That said sum and said demand was, as therein shown, exclusive of 20% of the total cost [64] of construction, which last-named sum, amounting to $7,600.00, was provided by the terms of said contract to be paid by defendant immediately upon the approval and acceptance of said bridge by defendant.

That prior to said 5th day of November, as shown in said demand, defendant had paid to plaintiff the sum of $12,624.00, and no more, leaving a balance due of $17,776.00, exclusive of the 20%, amounting to $7,600.00, so withheld as in said demand set forth.

That on said 5th day of November, 1917, defendant allowed and paid to plaintiff a portion of said demand, to wit, the sum of $4,976.00, and thereafter, on the 3d day of December, 1917, made a further payment thereon in the sum of $6,204.62, leaving a balance on said date due of $6,595.38, and in addition thereto the sum of $7,600.00, provided in said contract to be paid plaintiff immediately upon the approval and acceptance by defendant of said bridge, which approval and acceptance, as plaintiff alleges, was given and made on said 3d day of December, 1917.

SUBSTITUTE PARAGRAPH VIII.

That at said meeting of said Board of Supervisors held on the 3d day of December, 1917, plain-

tiff requested said Board to pay the amount due upon his demand of November 5, 1917, and remaining unpaid thereon after said allowance and payment of $4,976.00 thereon; as a result of such request said Board of Supervisors agreed to pay a further portion thereof, to wit, the sum of $6,204.62, including therein only certain of the items at the prices as per *addenda* for extras, as in said contract set forth, and then and there demanded of plaintiff that he should sign a demand prepared by said Board, enumerating therein the items of said November demand [65] to be allowed, aggregating the sum of $6,204.62, and then and there advised plaintiff that they would make no further allowance or payment on account of the amount theretofore by plaintiff demanded. That said sum was accepted by plaintiff under protest, and with the knowledge on the part of defendant that plaintiff was dissatisfied with such amount, and with the reservation on the part of plaintiff of his right to sue for the further sum of $14,195.38, being the balance due him under and by the terms of said contract. That said sum of $6,204.62 was paid by defendant to plaintiff on account of his contract on Little Colorado River bridge, together with extras therein listed, the items of which were at the time of the allowance of said sum set forth in said claim. That it was understood and agreed between plaintiff and defendant that the acceptance by plaintiff of the warrant for such sum of $6,204.62 should not be by defendant paid or by plaintiff received in

liquidation or settlement of the amount claimed to be due him under the terms of his said contract.

GEORGE J. STONEMAN,
Attorney for Plaintiff.

[Endorsed]: Substitute Paragraphs in Amended Complaint. Filed March 20, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [66]

Regular October, 1923, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, March 21st, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MARCH 21, 1924—TRIAL (CONTINUED).

All parties and respective counsel are present pursuant to recess, whereupon, trial is resumed.

Examination of R. C. Creswell is resumed.

Louis F. Mesmer, plaintiff herein, heretofore sworn, is recalled and examined by the defendant

under section 1680 of the Civil Code of Arizona 1913.

William H. Popert, heretofore sworn and examined, is now recalled by the defendant under section 1680 of the Civil Code of Arizona 1913, and further examined.

The defendant calls the following witnesses in its behalf:

Clarence H. Jordan, heretofore sworn, is examined.

Walter Dubree, sworn and examined.

Wallace Ellsworth, heretofore sworn, is examined.

Defendant's Exhibit "E" (Warrant #407) admitted and filed.

Defendant's Exhibit "A" (Memorandum) admitted and filed.

Defendant's Exhibit "C" (Memo. Aug. 12, 1916) admitted and filed.

Thereupon the DEFENDANT RESTS.

The PLAINTIFF RESTS.

The case is now submitted and taken under advisement and the plaintiff is given twenty (20) days from and after this date to submit brief of points and authorities on the questions indicated by the Court; the defendant is given twenty (20) days from date of service upon them to file reply brief; plaintiff is given ten (10) days from date of service of the reply brief in which to answer. [67]

In the District Court of the United States, Ninth Circuit, for the District of Arizona.

No. 56—IN LAW.

LOUIS MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

DEFENDANT'S ANSWER TO PARAGRAPHS 6 AND 8 OF AMENDED COMPLAINT, AS SUBSTITUTED MARCH 20, 1924.

Pursuant to leave of Court first had and obtained, the defendant files the following answer to the substitute paragraphs of plaintiff's amended complaint, which paragraphs were filed herein on March 20th, 1924.

Answering substitute Paragraph VI, defendant denies that plaintiff presented to the Board of Supervisors of Navajo County, Arizona, on the 5th day of November, 1917, an itemized statement, as required by the laws of Arizona, of the amount claimed to be due on said date for labor performed and materials supplied in the construction of the bridge described in plaintiff's amended complaint.

Defendant denies that the plaintiff ever presented to or filed with said Board of Supervisors of Navajo

County, Arizona, a duly itemized account, stating minutely what such claim was for and specifying each of the several items and the date and amount thereof within six months after the last item of such account accrued, and defendant further alleges that no itemized account of any kind or character of the demand now sued upon was [68] presented to the Board of Supervisors of Navajo County, Arizona, or filed in the files of said Board within six months from the date the last item of said account accrued.

Defendant denies that there was ever due plaintiff on account of his contract for the construction of the bridge mentioned in plaintiff's amended complaint, the sum of $30,400.00, and denies that there was ever due the plaintiff at any time upon said contract more than the sum of $23,800.00, less such payments as had theretofore been made.

Defendant specifically denies that on the 5th day of November, 1917, there was a balance due to plaintiff of $17,776.00, exclusive of the deduction of twenty per cent until completion of the contract, and denies that any sum whatsoever was due the plaintiff on that date, save and except the difference between the contract price of $23,800.00, and such payments as had theretofore been made by said Board of Supervisors.

Defendant denies that on the 5th day of November, 1917, the defendant allowed and paid the plaintiff the sum of $4,976.00, as alleged in said Paragraph VI of said amended complaint, but alleges

on the contrary that the defendant on that date paid to the plaintiff the sum of $4,976.00, and that the plaintiff received and credited the same as a part payment upon the contract price of $23,800.00, aforesaid, and not otherwise.

Defendant further denies that on the 3d day of December, 1917, the defendant made a further payment on the demand of plaintiff as stated in Paragraph VI of said amended complaint, but alleges on the contrary that on that date the defendant paid to plaintiff, and that the plaintiff received from defendant the sum of $6,204.62, as in full and complete settlement and satisfaction of all demands of the plaintiff against defendant [69] on account of the construction of said bridge, including all extras claimed by the plaintiff of every kind and character, and that upon the payment of said sum by defendant and the receipt thereof by plaintiff, there was a full and complete accord and satisfaction of all demands of every kind and character by the plaintiff against defendant.

Defendant therefore denies that after the payment of $6,204.62, there was a balance due the plaintiff of the sums mentioned in said Paragraph VI, and denies that there was any sum whatsoever due from the defendant to plaintiff after said sum of $6,204.62 had been paid.

Answering substitute Paragraph VIII, of said amended complaint, defendant denies that on the 3d day of December, 1917, the said Board of Supervisors agreed to pay, and denies that at any time

that it did pay the plaintiff the sum of $4,976.00, except as a part payment upon the contract price of $23,800.00, which plaintiff contracted to build said bridge for, and denies that the Board of Supervisors then or at any time agreed to pay the sum of $6,204.62, upon plaintiff's demand of November 5th, 1917.

Defendant further denies that plaintiff received said sum of $6,204.62 under protest, and denies that it was accepted with the reservation on the part of plaintiff of his right to sue for the further sum of $14,195.38, or any other sum whatsoever.

Defendant denies that said sum of $6,204.62 was paid by defendant to plaintiff upon any understanding whatever between plaintiff and defendant that the acceptance by plaintiff of the warrant for said sum should not be received by plaintiff as in liquidation or settlement of the full amount due him under the terms of his contract, but alleges on the contrary that said sum was received by plaintiff as hereinabove stated, to wit, as in full and complete satisfaction and payment of all demands of every kind and character of plaintiff against the defendant.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant.

[Endorsed]: Defts. Answer to Paragraphs 6 and 8 of Amended Complaint. Filed March 21, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Dep. Clerk. [70]

Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, April 8th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—APRIL 8, 1924—ORDER EXTENDING TIME TO AND INCLUDING APRIL 20, 1924, TO FILE BRIEF OF POINTS AND AUTHORITIES.

IT IS ORDERED BY THE COURT that time is hereby extended to April 20th, 1924, for the plaintiff to file his brief of points and authorities. [71]

Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, May 9th, 1924)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MAY 9, 1924—ORDER GRANTING DEFENDANT ADDITIONAL TIME TO FILE REPLY BRIEF.

On motion of the defendant, IT IS ORDERED that the time of the defendant is hereby extended ten (10) days from and after the time already allowed in which to file its reply brief herein. [72]

In the District Court of the United States, *Ninth Circuit,* for the District of Arizona.

No. L–56.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

DEFENDANT'S MOTION FOR JUDGMENT.

Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:

1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435, Revised Statutes of Arizona.

2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23d, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings. [73]

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5th, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called "extras" which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1,307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge and which were set forth in the contract, were to be paid for as "extras."

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a "memorandum of points and authorities," in support of its action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant.

[Endorsed]: Defendant's Motion for Judgment. Filed May 21, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [74]

Regular April, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, May 30th, 1924.)

No. L-56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—MAY 30, 1924—ORDER GRANTING PLAINTIFF ADDITIONAL TIME TO FILE REPLY BRIEF.

IT IS ORDERED BY THE COURT that time of plaintiff is hereby extended ten (10) days from and after the time heretofore allowed in which to file reply brief. [75]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, July 8th, 1924.)

No. L-56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JULY 8, 1924—ORDER OVERRULING MOTION FOR JUDGMENT.

IT IS ORDERED BY THE COURT that the defendant's motion for judgment herein be and the same is hereby overruled. It is ordered that an exception be allowed and noted for the defendant. [76]

Regular March, 1924, Term, at Prescott.

In the United States District Court, in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Tuesday, July 8th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JULY 8, 1924—JUDGMENT.

This cause having come on regularly for trial on the 17th day of March, 1924, the plaintiff appearing in person and by his counsel, George J. Stoneman, Esq., and the defendant appearing by its counsel, Clark & Clark, Esqs., Thorwald Larson, Esq., and C. H. Jordan, Esq., and the jury having been waived by stipulation in open court, and evidence having been submitted to the Court, both by the plaintiff and the defendant, and thereupon the cause having been argued, and on the 21st day of March, 1924, submitted to the Court for its consideration, and the defendant having moved the Court for judgment, which motion of the defendant was ordered overruled, now after due consideration of the

case and the Court being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Louis F. Mesmer, do have and recover of and from the defendant, Navajo County, the sum of Thirteen Thousand Eight Hundred Seventy-two Dollars and Sixty-five Cents ($13,872.65), together with his costs herein sustained taxed at the sum of One Hundred Fifty-two Dollars and Ten Cents ($152.10).

Exceptions are ordered entered on behalf of both the plaintiff and the defendant. [77]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, July 11th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—JULY 11, 1924—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

IT IS ORDERED BY THE COURT that time of the defendant, Navajo County, in which to file

its bill of exceptions herein is hereby extended seventy-five (75) days from and after the time allowed by law.

An exception to said order is ordered saved to the plaintiff. [78]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, October 2d, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 2, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 17, 1924, TO FILE BILL OF EXCEPTIONS.

On application of the defendant, good cause appearing therefor, the time within which to prepare and file bill of exceptions in this case is hereby ordered extended to and including the 17th day of October, 1924. [79]

In the District Court of the United States, District of Arizona.

No. L–56—PRESCOTT.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 17th day of March, 1924, at a stated term of the above-entitled court, begun and held in Phoenix, in and for the District of Arizona, before the Honorable Fred C. Jacobs, District Judge, the issues joined in the above-entitled cause between the said parties, to wit, an action by plaintiff against defendant to recover $13,973.65 for extras alleged to have been furnished by plaintiff under its contract with defendant for the construction of a certain bridge over the Little Colorado River near Winslow, Arizona, and $3,216.00 for damages alleged to be due to delays caused by defendant (the latter item having been during the trial eliminated by plaintiff from his complaint), came on to be tried before the said Judge, without the intervention of a jury, the parties aforesaid, by their counsel, having, by oral stipulation in open court, waived a jury.

The plaintiff was represented by George J. Stoneman, Esq., his attorney, and the defendant by Thorwald Larson, County Attorney, and by E. S. Clark and Neil C. Clark, of counsel, and upon the trial of that issue the attorneys for the said Louis F. Mesmer, plaintiff, to maintain and prove the said issue on his part, called as a witness Wallace Ellsworth, who being duly sworn, testified, among other things, as follows: [80]

TESTIMONY OF WALLACE ELLSWORTH, FOR PLAINTIFF.

Q. Give your name, Mr. Ellsworth, to the reporter. A. Wallace Ellsworth.

Q. Where do you reside, Mr. Ellsworth?

A. Holbrook, Arizona.

Q. What official position, if any, do you now occupy? A. Clerk of the Board of Supervisors.

Q. How long have you been Clerk of the Board?

A. Since January 1, 1923.

Q. As Clerk of the Board of Supervisors, have you in your custody, care and control, the records and the books, papers and documents making up the matters filed with the Board of Supervisors of that county? A. Yes, sir.

Q. You appear here, Mr. Ellsworth, in response to a *subpoena duces tecum* to produce certain books, papers, and documents, do you not? A. Yes, sir.

Q. Have you brought with you such of those books, papers and documents as you were able to

(Testimony of Wallace Ellsworth.)

find, in response to the subpoena? A. Yes, sir.

Q. Have you the call for bids of Navajo County for bridge construction that I think I said that I would designate as No. 1?

(Witness produces document.)

Q. You hand me what is the call for bids in response to my question? A. Yes, sir.

Q. Does this call for bids contain also brief specifications showing the construction desired upon the different bridges to be built by the county?

Mr. CLARK.—I rather think that the instrument speaks for itself, your Honor.

Mr. STONEMAN.—Withdraw the question, Mr. Clark. I would like to offer this evidence at this time. If you object to it I will mark it for identification. We offer it in evidence and ask that it be marked with the proper designation as plaintiff's exhibit. I limit my offer to the use of this instrument only in so far as it relates to the construction of Bridge T–3 upon which this action is based.

Mr. CLARK.—If the Court please, we shall object to it upon the ground that it is immaterial, it appearing that long after that a contract was signed with full specifications, to which counsel has already referred, and that a mere proposal for bids would have no bearing whatsoever on that one way or [81] the other, no matter what it might be and that it is immaterial and an encumbrance of the record."

Following the foregoing objection, the following colloquy took place between the Court and counsel:

"The COURT.—This does not tend to alter or change or modify the contract in any way, that is, contradict it?

Mr. STONEMAN.—It simply shows the inception of this transaction and also includes in it certain specifications upon which the proposal and specifications afterwards made and drafted by the plaintiff in this case, and in that respect we deem it material."

WHEREUPON the Court overruled the objection aforesaid, to which ruling the defendant then and there excepted and thereupon said call for bids was admitted in evidence, marked Plaintiff's Exhibit 1. Whereupon the following evidence was offered by counsel for plaintiff:

"Mr. STONEMAN.—We offer in evidence what purports to be a copy of an original report addressed to the Supervisors of Yavapai County, and purported to be signed by Charles E. Perkins, County Engineer, and I ask that it be marked Plaintiff's Exhibit 4."

To which offered evidence counsel for the defendant then and there objected on the ground that it was a copy; that no foundation had been made for the introduction of secondary evidence. That there was no showing that Mr. Perkins himself could not have been called and identified and relate the history connected with it. That it bore neither

(Testimony of Wallace Ellsworth.)

date nor signature, nor was it in anywise identified as an official report.

THEREUPON the following colloquy occurred:

"The COURT.—Mr. Ellsworth, have you endeavored to find the original of this report?

A. Yes, sir.

Q. Have you searched the files of the office diligently for that purpose? A. Yes, sir.

Q. Have you inquired as to the original? [82]

A. Yes, sir.

Q. You have been unable to find it?

A. I have been unable to find it.

Q. It is not in the files of the office where it belongs? A. No, sir.

The COURT.—Is there any further objection to it?

Mr. CLARK, of Counsel.—We have, I think, made the objection that it is irrelevant and incompetent and immaterial and that it has not been established in any way by any evidence as the report of the officer whose report it purports to be—nothing of any kind or character. In other words, it imports no verity or authenticity as it stands and we avow—I am speaking for myself—that it is something new to us entirely.

The COURT.—Why, the gentleman who made the report was the County Engineer.

Mr. CLARK.—C. E. Perkins was County Engineer at the time this contract was made.

The COURT.—You admit that?

(Testimony of Wallace Ellsworth.)

Mr. CLARK.—But he was not authorized to speak for, or bind this Board of Supervisors in any way at that time.

The COURT.—Well, the contract under which this suit is based refers to the engineer and it confers certain powers upon him. Of course, I don't know what this report says but this report may be a statement of his conduct under the terms of the contract."

THEREUPON counsel withdrew that portion of his objection based upon his statement that there was no showing that Mr. Perkins himself could not have been called and identified, but not withdrawing any of the other objections. Whereupon, said objection was by the Court overruled, to which ruling the defendant then and there excepted, and said purported report was admitted in evidence as Plaintiff's Exhibit No. 4, which said exhibit is hereto attached and properly marked, for identification and is asked to be read and considered as though herein fully set out.

WHEREUPON said witness was asked by counsel for plaintiff the following question:

"Mr. STONEMAN.—Under what date of the meeting of the Board of Supervisors is that minute entry made?

A. Under date of August 7, 1916. [83]

Q. Read that into the record.

Mr. CLARK.—Now, if the Court please, we shall object to that on the ground that it is irrelevant, incompetent, and immaterial and that on its fact it

was a minute of the Board of Supervisors made prior to the execution of the contract between the plaintiff and defendants here and that different conditions may have been talked of or discussed or placed of record prior to that time having no bearing on the contract itself and are no part of it and, therefore, ought not to be admitted in evidence unless shown in the contract itself.

The COURT.—What does it purport to be?

Mr. STONEMAN.—The purport of it is that the bid of Mesmer and Rice, being the best bid, is accepted and approved subject to the approval of the contract, specifications and plans by the United States Indian Department.

Mr. CLARK.—We think your Honor can see that it is immaterial. The contract or the bid must have been accepted or there would have been no contract and, if the latter part of this, which refers to the Indian Department, is in the contract itself, which it is not, then this might shed some light on it but, inasmuch as it is not and everything pertaining to the Indian Department was carefully stricken from the contract before signing, we say this can have no bearing.

The COURT.—Don't you put them upon proof by the allegations of your answer as to the very subject of the execution of this contract?

Mr. CLARK.—Not as to anything prior to the date of the contract itself and we confine our answer to that. There are certain allegations in the complaint as to what transpired afterwards, which, of course, are material and we have denied those

in so far as we have seen proper. In any event, he would not be put to proof of any immaterial matter.

The COURT.—No. The objection is overruled."

To which ruling counsel for defendant then and there duly excepted and the witness read the record in question as follows:

"A. The bid of Mesmer & Rice of Los Angeles, California, being lowest and best bid received for the construction of bridge across the Little Colorado River near Winslow at a cost of $23,800.00, the same is accepted and approved subject to approval of contract, specifications, and plans therefor by the United States Indian Department, which department expects to pay one-half of the cost of construction of same bridge."

THEREUPON the plaintiff further to approve and maintain the said issue on his part, called as a witness R. C. Creswell, counsel stating that he was calling said witness under provisions of paragraph 1680, R. S. A. 1913, for the [84] purpose of cross-examination.

(Paragraph 1680 reads as follows: A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended or the directors, officers, superintendent or managing agent of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-exammation, at the instance of the adverse party or par-

ties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony. Such witness when so called may be examined by his own counsel, but only as to the matters testified to on such examination.)

THEREUPON counsel for defendant objected to the cross-examination of said witness for the reason that he was not then a supervisor; that he is in no official position of any kind or character, having left the office, and that anything he might testify to at this time should proceed under the usual rule, as plaintiff's witness without the right of cross-examination; that as the official relation has ceased one who has been an officer may be made a witness only as other witnesses and it would be highly dangerous to invoke any other rule. That the witness is now a private citizen not bound by official sanction.

THEREUPON the following colloquy occurred:

"The COURT.—Well, the rules of evidence in the State Courts do not apply in the Federal Court.

Mr. STONEMAN.—No, I know that.

The COURT.—Q. During all of these proceedings, Mr. Creswell, were you a member of the Board?

A. Yes, sir. That is, during the time the contract was being let and settled up.

The COURT.—You are offering him for cross-examination?

Mr. STONEMAN.—Yes, sir. I don't want necessarily to be bound. I don't know what he is going to say. I never talked to him, being an adverse witness.

The COURT.—You are merely going to examine him as to this contract and his participation in it? [85]

Mr. STONEMAN.—Yes, sir.

The COURT.—Well, the objection will be overruled. However, you will be limited to that contract and matters that occurred before he retired from the Board.

Mr. STONEMAN.—Yes, sir.

To which ruling counsel for the defendant then and there excepted.

THEREUPON said witness testified among other things, as follows:

TESTIMONY OF R. C. CRESWELL, FOR PLAINTIFF.

"Mr. STONEMAN.—Q. Mr. Creswell, do you remember receiving during the month of September or perhaps October, 1916, a letter addressed to you as chairman of the Board of Supervisors by E. B. Merritt, Assistant Commissioner of Indian Affairs? A. Yes, sir.

Q. Would you recognize a copy of the letter, if you saw it? I hand you what we think is a copy of the letter and ask you if you received the original?

(Testimony of R. C. Creswell.)

A. Yes, sir. I think I received the original of that, if I remember.

Q. Do you know where the original is, Mr. Creswell? A. No, sir, I do not.

Q. You left it, I suppose, with the Board of Supervisors?

A. Well, I either left it there or copy there. This was sent direct to me at Winslow.

Q. Did you communicate the contents of that letter when it was received by you to the Board of Supervisors? A. Yes, sir.

Mr. STONEMAN.—We offer this in evidence now and ask that it be marked Plaintiff's Exhibit 6.

Mr. CLARK.—That has been marked plaintiff's exhibit already.

Mr. STONEMAN.—That has been marked plaintiff's exhibit for identification.

Mr. CLARK.—We object to it on the ground that it is immaterial and hearsay.

The COURT.—Q. How did you get it—through the mail? Did it come to you through the mail?

A. Yes, sir.

Mr. CLARK.—Please add to that objection that it is incompetent.'' [86]

The COURT.—Objection is overruled.

To which ruling of the Court the defendant then and there excepted.

THEREUPON said purported letter was admitted in evidence as Plaintiff's Exhibit No. 6, and is hereto attached as such exhibit duly numbered for

(Testimony of R. C. Creswell.)

identification and asked to be read and considered as a part hereof.

"Mr. STONEMAN.—Your Honor has read the letter?

The COURT.—Yes, sir. Was that marked for identification?

The CLERK.—Yes, No. 6.

The COURT.—It is now 6 in evidence."

WHEREUPON said witness further testified as follows:

"Mr. STONEMAN.—Q. I hand you what purports to be a copy of a communication dated at Holbrook, August 9, 1916, addressed to the Board of Supervisors of Navajo County, purporting to be signed by Thomas F. Nichols for the State Engineer, and ask you if you ever saw the—ask you to examine this copy and state whether or not you ever saw the original of it?

A. It has been so long that I don't know whether I could recall the exact wording but he made such a report I know. (Witness reads document.) As far as I know, I think it is a copy of the report from Mr. Nichols, State Engineer.

Mr. STONEMAN.—We offer this copy to which the witness has just testified and ask that it be marked as a plaintiff's exhibit with the appropriate designation."

(Counsel for plaintiff asked counsel for defendant if they had the original of this report, and were informed that they did not.)

(Testimony of R. C. Creswell.)

The copy to which the witness had just testified was then offered in evidence to which offer counsel for defendant objected on the ground that on its face it was a report made prior to the filing of the contract. That all prior matters were deemed to be incorporated in it. That it was immaterial, irrelevant and incompetent; that it is hearsay as it stands, and without authenticity. Which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON said copy was admitted in evidence as Plaintiff's Exhibit 13, a copy of which exhibit duly numbered for identification is hereto attached and asked to be read and considered as a part hereof.

THEREUPON the plaintiff offered in evidence further [87] testimony on the part of said witness as follows:

"Mr. STONEMAN.—Q. When did you see the demand that I filed on behalf of Mesmer and Rice with reference to the time that some kind of a meeting, legal or otherwise, was held by the Board of Supervisors on or about the 23d day of May, 1918?

A. Well, I can't remember those dates at all.

Q. You remember the meeting being held, don't you?

A. I remember hearing them talk about it, yes, but as I say, I don't remember being at that meeting.

Q, Who talked to you about it?

(Testimony of R. C. Creswell.)

A. I think Mr. Owens did.

Q. What did Mr. Owens say?

To which question the counsel for defendant then and there objected on the ground that it was hearsay and immaterial. His objection was by the Court sustained.

THEREUPON the following question was purported by counsel for plaintiff:

"Q. How did Mr. Owens or Mr. Freeman happen to speak to you at all about it, do you know?" To which question counsel for defendant made the objection that it was immaterial and that it called for a conclusion. Which objection was by the Court overruled. To which ruling, defendant then and there excepted and the witness thereupon testified as follows:

"A. Well, as I remember, Mr. Owens remarked that Mr. Stoneman was over there and wanted to reopen that case of Mesmer & Rice, and they could not see any necessity of reopening it. They said they had paid them in full.

Q. How did you first acquire any information as to whatever was done at this meeting?"

To which question counsel for defendant objected on the ground that it was immaterial.

WHEREUPON the following colloquy ensued:

"The COURT.—He might have acquired the information from the record.

Mr. CLARK.—Then it would be more objectionable. It [88] would be pure hearsay if he re-

(Testimony of R. C. Creswell.)

ceived it from a record. The record would be the evidence.

The COURT.—Do you contend that the Board of Supervisors or any other board or public body may hold a special meeting and solemnly transact business that affects the rights of individuals and fail to record it and preclude the party from proving it after they have acted upon it?

Mr. CLARK.—No, sir, and we say that nothing of this kind has been done by this Board at any time. We will make this suggestion. First, that this meeting was not a meeting of the Board of Supervisors as such. It was called as a mere conference at Mr. Stoneman's request and the telegram upon which it was based was dated the 19th of May, 1923, and this meeting was held at his request on the 23d, only four days between the date of the telegram and the date of this meeting. Now, at this meeting, your Honor, the Board of Supervisors could not legally have taken any action upon any claim to the prejudice of this plaintiff. The statutes require that every claim be presented at a regular meeting, not a special meeting. A special meeting may not be held for the purpose of considering a claim and we think counsel is aware of that and, if no action was taken at that meeting, it was because among other things, that the claim was presented to the Board for the first time then and at a special meeting, at which they could not legally consider it. Now, I am not saying what counsel may have understood. I am stating

(Testimony of R. C. Creswell.)

the situation as it is to your Honor and we are within our rights in objecting to all of this testimony. We haven't a scrap of paper nor a word of testimony as to anything that happened that is not wide open to counsel and I think they too appreciate that. If certain things are gone, they are gone from us as well as from him."

Which objection was by the Court overruled. To which ruling defendant then and there excepted and the witness was then permitted to testify as follows:

"A. Well, just as I stated, I think Mr. Owens told me he had been over there—that Mr. Stoneman had been over there to Holbrook and talked with him and Mr. Freeman over this claim of Mesmer & Rice.

The COURT.—Mr. Creswell, you called that special meeting, did you not?

A. I sent that telegram that I got from Mr. Stoneman to the clerk and asked him to phone the other two members.

Q. Yes, and they were all present?

A. The other two were present, but I don't recall to my mind that I was there.

Q. You say you were not there?

A. I don't think I was there, Judge.

Q. Do you know that you were not there?

A. No, I was not there."

TESTIMONY OF C. E. OWENS, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

THEREUPON C. E. OWENS, who had theretofore been duly [89] sworn was recalled for further cross-examination in behalf of plaintiff, and among other things he was asked the following questions:

"Mr. STONEMAN.—Q. That was the meeting at which the warrant for $6,204.00 was paid?

A. Well, I don't remember as to the date. I remember that meeting, yes.

A. Now, the $6,204.00 was a part of the amount that has been claimed by Mesmer & Rice before December 3, wasn't it?"

To which question counsel for defendant then and there objected on the ground that it called for a conclusion of the witness and that the transaction must speak for itself from the record as made.

WHEREUPON the following colloquy occurred:

"The COURT.—I think they have a right to explain it.

Mr. CLARK.—Yes, but he is asking him if it was not a part, which, of course, would be asking this witness to practically determine this whole question if it was not a part of the claims already presented, if I understood counsel right. Am I right in that, Mr. Stoneman? Certainly we shall object to that."

WHEREUPON defendant's objection was by

(Testimony of C. E. Owens.)

the Court overruled to which ruling counsel for defendant then and there excepted.

THEREUPON said witness was permitted to testify as follows:

"A. This $6,204.62 was the final payment that was due, according to our understanding on the contract on that bridge and this was the demand that we approved and paid.

Q. Now, prior to that time, this demand of November 5 had been presented, hadn't it, and you rejected it? A. Yes, sir.

Q. I am handing the witness Plaintiff's Exhibit 10."

(Being the demand filed by plaintiff against the defendant county on November 5, 1917.)

"Now, isn't it true, Mr. Owens, that the $6,204.65 that was finally paid to Mr. Mesmer on December 3, 1917, was intended to—by the Board of Supervisors to be a compromise and a settlement of all the money that had been demanded by [90] Mesmer & Rice in November or at any previous time?

A. No, sir, I do not understand it that way.

Q. How do you understand it?

A. I understand that $6,240.00 was the last payment due on the contract and the reason that we rejected this thing because there was no evidence there to show us where these things were placed. There is nothing attached to the demand to give us any evidence why we should pay that extra amount.

Q. But you knew that the $6,204.00 which you

(Testimony of C. E. Owens.)

allowed on December 3 was included in the demand of November 5, didn't you?

Mr. CLARK.—Now, we object, because that must appear—

Mr. STONEMAN.—Q. What was your answer?

Mr. CLARK.—Just a minute. That must appear, if it appears at all, from the face of the demands. The statute requires that these demands be itemized and that each item—in each item it shall minutely state what it was for and all that sort of thing. Now, assuming that these gentlemen have followed the law and I presume they did, it will appear from the face of these demands themselves whether the last one on December 3 includes any part of those theretofore presented and rejected. Now, we don't think there could possibly be any other rule.

The COURT.—When was this claim filed, on the same date, December 3?

Mr. STONEMAN.—On the same day. I think about five minutes before it was acted upon.

Mr. LARSON.—This one which he now holds was filed on November 5.

Mr. STONEMAN.—But I thought he had this part that was filed on November 5—

The COURT.—Did you file a claim for that $6,204.00?

Mr. STONEMAN.—How?

The COURT.—Did you file a separate claim for that $6,204.00?

Mr. CLARK.—Yes, sir, it is in evidence here.

(Testimony of C. E. Owens.)

Mr. LARSON.—And that claim was paid in full.

The COURT.—And this is the claim that was filed November 5?

Mr. CLARK.—Yes, sir.

The COURT.—What is the amount of that?

A. $17,776.00.

Mr. STONEMAN.—Q. Now, didn't that claim of November 5 include the amount of money which you admitted that you owed him, $6,204.62? [91]

Mr. CLARK.—That is already objected to and we object to it further on the ground that that calls for a pure conclusion of this witness.

Mr. STONEMAN.—I will change the question, Mr. Clark.

Q. Didn't you so understand on December 3 that that $6,204.62 was included in one or the other—in the demand of November 5?

Mr. CLARK.—That is already objected to. We certainly object to it. An understanding is something so intangible we can't reduce it to this record. It must appear by the face of those demands whether or not the later demand of December 3 was included in any portion of the former, and if the demands were properly made, and I am assuming that they are, they will so show one way or the other.

The COURT.—If this witness knows, why can't he testify to it?

Mr. CLARK.—He asks him to testify to an understanding, which understanding must appear

(Testimony of C. E. Owens.)

from the face of the demands themselves under the legal rule.

The COURT.—Well, the first question was—he asked him if it was not included and it was not part. He changed the question.

Mr. CLARK.—That is the thing that this Court should determine from an inspection of the demands themselves whether it is or not.

The COURT.—Well, I may not be able to determine.

Mr. CLARK.—Then this witness surely, we claim would not have the right, if the demands were put in such shape that this Court could not determine it—we ought not to be bound by the fallacious conclusion, as we think it would be, of any witness.

Mr. STONEMAN.—May it please your Honor, I withdraw that question and ask him questions with regard to the claim of October 1.

Q. The amount of $6,204.00 which you paid to Mr. Mesmer on December 3, 1917, was included in the demand of October 1 or, in this case, Plaintiff's Exhibit 9, was it not?

Mr. CLARK.—That is the same question in slightly different form and we object to it upon the same grounds."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted, and the witness was permitted to answer as follows:

"A. Well, whether that part of it was included

(Testimony of C. E. Owens.)

in that or not, I can't say at the present time but these demands were fixed up in such a way that we as Board of Supervisors did not feel like we nave a right to honor them and, therefore, we rejected them as they was in the whole amount.

Mr. STONEMAN.—Q. Why did you reject the demand of October 1 with the items of the different amounts claimed? [92]

Mr. CLARK.—Well, now, we object to that.

Mr. STONEMAN.—In what respect does not—did it warrant the action of the Board of Supervisors?

Mr. CLARK.—The witness has answered that question once.

The COURT.—He has asked as to November 5 but he has not as to October 1.

Mr. STONEMAN.—That claim of October 1, as your Honor will recall, was deferred—the action on it was deferred until November.

Mr. CLARK.—Yes, that is the record. Now, in the first place, in support of our objection, we say that the witness no supervisor is bound to give a reason for the rejection of a claim; that their reason ought to appear from the claim itself and we say that it does appear plainly on the face of this demand.

The COURT.—I don't know of any rule that would preclude him from giving his reasons. If he knows why the Board acted in the way in which it did, I think he has a right to testify. The objection is overruled."

(Testimony of C. E. Owens.)

To which ruling the defendant then and there excepted and the witness was permitted to testify as follows:

"A. Our reasons for rejecting this demand is the same as the other. There is nothing there to satisfy the Board as to the evidence of these things that were passed on there. There isn't an O. K. there of the inspector or nothing attached to that bill where they incurred that extra expense and we could not honor a demand like that.

Mr. STONEMAN.—Q. Well, you refer only to the extra expense. How about the structural steel, 147 tons at $120.00 a ton, amounting to $17,640.00? what is the objection to that?"

To which question counsel for the defendant objected on the ground that if there was any informality or defect in the demand it was not the fault of the defendant. That if a certain number of tons of steel were charged for in that demand that before the Board could pay it there would have to be a showing somewhere on the demand or by some agency or direction of the County Engineer, showing how much steel would have been required under the contract or under the proposal, so that if the plaintiff had furnished more *more* that would show why demand was made for so many tons of steel. That if this did not appear on the face of the demand, it was not the fault of [93] the Board. Which objection was by the Court overruled, to which ruling the defendant then and there excepted and the witness was permitted to testify as follows:

(Testimony of C. E. Owens.)

"Mr. STONEMAN.—Q. What was the objection to the first item there?

A. Because the demand was not itemized sufficiently and it claimed more money on there than they were entitled to and we demand an itemized demand."

THEREUPON, on the 18th day of March, 1924, the following proceedings were had:

"The COURT.—You may proceed with this Mesmer case.

Mr. CLARK.—Just a minute, if your Honor please, in the matter of Plaintiff's Exhibit 17, which, as I remember it, is the demand that was presented by the plaintiff to the Board of Supervisors or at least to certain members of the Board on the 23d day of May, 1918. I am not sure what objection was made by the defendant to the introduction of that exhibit, if any, and I am, therefore, asking leave to supplement the objection, if any was made, or to let the record show that one was made at this time as follows: First, that the alleged statement or demand is not itemized as required by the statutes of Arizona; secondly, that at the time it was presented there was no indebtedness of any kind or character on the part of Navajo County towards this plaintiff; third, that this claim is not sued upon or mentioned in any way in the complaint, as will appear by reference to page 10 of the amended complaint, wherein it is said that the demand of this plaintiff was presented on or about the 3d day of December, 1917; that there is no showing in the

complaint that this demand was ever presented or filed within six months from the time the alleged claim arose or any item in it; lastly, that it is irrelevant, incompetent and immaterial.

The COURT.—Well, there may be some force to the ground that it was not filed within six months. What do you say to that, Mr. Stoneman?

Mr. STONEMAN.—If your Honor please, as this case has progressed, it has become apparent to me that it will be necessary to ask leave of Court to substitute certain—substitute for certain paragraphs of the complaint other paragraphs to make it conform to the evidence, which I will ask leave of Court after the evidence is in. If the plaintiff is in court at all, he is in court because of the fact that the final action of the Board of Supervisors upon the amended demand was made in December.

The COURT.—Yes, December 3.

Mr. STONEMAN.—On May 23, so that the Board of Supervisors might know the items of the November demand upon which we claim they did act in December, a supplemental claim was made, with the request that it be considered in connection [94] with that demand. That request, the Board of Supervisors, as has been testified to, refused to act upon in any way. They neither accepted it nor did they deny it, nor did they make any record of it at all, so that we are not suing upon the demand as a separate demand as filed on May 23, but we are still suing upon the demand which was theretofore filed, of which we ask that the items in the demand of

November 23 may be considered a part—not admitting but assuming that that would do away with the last possible objection to the demand of November 23.

The COURT.—November 23 or December 3 or May 21 or 23, and I am not clear on the right of a claimant against a county. That claim has been rejected because of its insufficiency to come in several months later and file specifications to revive the claim, especially after the claim or suit on it would have been barred, if it would be barred in this instance. Of course, it would not if your final action was on December 3 or, on your statement that you desire at the close of the case to amend to conform to the proof, of course, if there is any proof in here that is material, the Court would be disposed to allow you to amend to conform to it and the motion—It is a motion to strike.'

Mr. CLARK.—Well, it was a motion really—that probably would be the effect. My request was that the record show that the objection stated this morning be admitted to have been made to the introduction of this exhibit.

The COURT.—Well, I could not entertain—

Mr. CLARK.—Very well, I will put it in the form of a motion to strike upon that ground.

The COURT.—Well, at this time, I will deny your motion."

To which ruling the defendant then and there excepted and thereupon the plaintiff, to further prove and maintain the said issue on his part, called as a

(Testimony of R. S. Teeple.)

witness R. S. Teeple, who being duly sworn, testified in behalf of plaintiff, and among other things was asked the following question respecting a certain demand said to have been presented by the plaintiff on May 17, 1917, to the Board of Supervisors of Navajo County for the sum of $17,856.00:

TESTIMONY OF R. S. TEEPLE, FOR PLAINTIFF.

"Q. Do you remember seeing a demand presented by Mesmer and Rice on May 17 for $17,856.00 upon which that warrant was paid and shown by what purports to be a carbon copy of a demand, which I hand you?

The COURT.—Is that 1917?

A. Yes, sir. I believe I recollect this, Mr. Stoneman. I can't say as to those figures.

Q. Now, wasn't it upon this demand that that warrant of $10,000.00 was issued? [95]

A. That is my recollection, although a new demand might have been made out.

Q. You recollect that it was this. We offer this in evidence upon the identification of it by this witness and ask that it be marked a separate exhibit."

To which offer counsel for defendant objected on the ground that it was irrelevant and incompetent and that the complaint is not based either wholly or in part upon any demand of May 17, 1917.

THEREUPON Mr. Stoneman, for plaintiff, made the following explanation:

(Testimony of R. S. Teeple.)

"Mr. STONEMAN.—It is offered not for the purpose of that—that purpose at all. It is offered for the purpose of showing that the Board of Supervisors has, at least in this instance, made an allowance upon—without a separate demand covering the amount allowed being presented."

WHEREUPON the objection to the offer of said evidence was by the Court overruled, to which ruling counsel for defendant then and there excepted, and said purported demand was admitted in evidence and marked Plaintiff's Exhibit 19, which is hereto attached, properly marked and numbered for identification and is hereby referred and asked to be considered as a part hereof.

THEREUPON, upon cross-examination of the same witness, who testified, among other things, as follows:

"Mr. CLARK.—But I am asking you if the demand was not accompanied or if there was not along with it an estimate of the engineer or inspector as to the amount—proportionate amount due Mesmer and Rice on their contract?

A. There might have been a written estimate, Mr. Clark, or there might have been a verbal advice on that matter. My recollection is that the Board did not make any payment to Mr. Mesmer except on either written or oral advice of their engineers.

Q. Yes, and when you say advice, do you mean advice as to the amount of labor or material furnished, so that the Board could get some idea of

(Testimony of R. S. Teeple.)

how much was due under the contract; is that the idea? A. Yes, sir. [96]

Q. And was that the custom throughout until the final payment on December 3, 1917? A. Yes, sir."

THEREUPON, respecting the demand of plaintiff against Navajo County, dated December 3, 1917, counsel for defendant asked the witness the following questions:

"Q. Now, calling your attention, Mr. Teeple, to the line starting with the word 'less' purporting to be credits on this demand, opposite which is a total of $17,000.00, as I remember it?

A. Yes, sir, $17,600.00.

Q. $17,600.00 is right. Now, I will ask you if that amount does not include all payments of every kind and character theretofore made by the Board of Supervisors to the plaintiff on this bridge?

A. It was so intended.

Q. I am asking you if it does not?

A. It does, yes."

WHEREUPON counsel for plaintiff moved that said answer be stricken out for the purpose of making an objection, which motion was by the Court sustained.

WHEREUPON counsel for plaintiff objected to the question on the ground that the witness was not qualified to answer. Which objection was by the Court sustained, to which ruling the defendant then and there excepted.

THEREUPON after said testimony had been given by said witness as to additional work done

(Testimony of R. S. Teeple.)

upon the bridge in question by the county in order to complete it, the following proceedings were had:

Mr. STONEMAN.—I move that the entire testimony of this witness on examination of Mr. Clark be stricken, upon the ground that it is contrary to the record made in this case, in that the record shows in this case that the plaintiff's claim the payment of $6,204.00 in final acceptance and payment of all demands upon the construction of that bridge and that it is incompetent for the purpose of disputing the record that the Supervisors did accept the bridge and finally paid for it.

The COURT.—Yes, any work that was done after the completion of the contract by Mesmer & Rice would be immaterial, unless it was a claim here that they had failed to perform [97] the contract, and there is no such claim.

Mr. CLARK.—There is no such claim.

The COURT.—Well, the motion is granted and the evidence may be stricken."

To which ruling of the Court the defendant then and there excepted.

THEREUPON the plaintiff, to further prove and maintain said issue on his part, called as a witness the plaintiff, Louis F. Mesmer, who being duly sworn, testified in his own behalf, and among other things was asked the following questions, as to the conversation alleged to have occurred about August 8, 1916, and prior to the execution of the contract in question which was made on September 5, 1917, said conversation purporting to have been made with Mr. C. E. Perkins, County Engineer:

TESTIMONY OF LOUIS F. MESMER, FOR PLAINTIFF.

"Mr. STONEMAN.—Now, then, what conversation, if any, led up to the —— and what reasons were there why the payment for the additional work suggested by the County Engineer should not be included in the $23,800.00? In other words, I mean why was it the provision put in there that the substructure should be constructed according to the *addenda* rather than that it should come out of the $23,800.00?"

To which question counsel for defendant there and there objected on the ground that it involved an executive matter, something that could only be determined by the Board of Supervisors and anything that the County Engineer may have said as to that could not be binding upon the defendant at all. That it was incompetent for the purpose offered or for any purpose.

"The COURT.—No, but it may be leading up to a question that is.

Mr. CLARK.—Nevertheless, your Honor, we do not think it ought to go in, for the reason stated. It is incompetent for the purpose offered or any purpose.

The COURT.—Q. This was the engineer in charge of the work for the company, you say?

A. This was an engineer. He was County engineer and the County Board referred these plans and specifications to him.

(Testimony of Louis F. Mesmer.)

The COURT.—The objection is overruled.

Mr. CLARK.—We will note an exception.

Mr. STONEMAN.—Q. Now, then, was there any discussion as to the reasons why the changes contemplated should not be paid for and included in the lump sum of $23,800.00 that you [98] said you would construct the bridge for under the original plans and specifications?

Mr. CLARK.—We make the same objection, your Honor. That is an executive matter that could only be settled by the Board.

The COURT.—Yes, but it is merely a discussion. The objection is overruled. You may have an exception.

Mr. CLARK.—Yes, we will take an exception.

A. The original plans provided, for instance, that the end cylinders would be thirty-three inches in diameter and have two piles in each cylinder and filled with concrete twenty-one feet long. The alteration, for instance, in the end cylinders, substituted for a thirty three inch cylinder a seventy-two inch cylinder, one that was thirty feet long instead of twenty-one feet long, one filled with seven piles driven to a fifteen ton refusal and piling requiring thirty foot of length as against the original one which only required two piles. Understand, in the original plans, two piles and they were increased to seven. Originally, the cylinder was twenty-one feet long and the new cylinder was thirty feet long. The diameter of the original cylinder was two foot nine

(Testimony of Louis F. Mesmer.)

inches and the diameter of the final cylinder was seventy-two inches, a very material difference."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted.

THEREUPON said witness was asked the following question:

"Mr. STONEMAN.—At that time did Mr. Perkins say anything to you about the possibility of further changes by reason of the requirements that might be made by the representative of the Indian Department?"

To which question counsel for defendant then and there [99] objected on the ground that additional quantities required before the contract was made and signed, and particularly before any construction had started, were immaterial. That they were not matters which come within what counsel calls *addenda* for the reason that all of these things to which the witnes has just testified as being additional quantities and sizes set forth in the proposal are in terms cited in the contract. That the plaintiff is to furnish each one of these things which have been mentioned and which are mentioned in the report of the County Engineer and the report of Mr. Nichols. The other reason is that the *addenda* to which counsel has referred to has this provision and it is in the contract as well as in the proposal: "If, after construction has commenced it appears that additional quantities are required, they shall be paid for as follows," and that the contract itself

(Testimony of Louis F. Mesmer.)

provides that the *addenda* shall only become effective after construction is commenced, if it be apparent that additional quantities are required.

Which objection was by the Court overruled; to which ruling the defendant then and there duly excepted, and the witness was permitted to testify fully as to the matters embraced in the question.

THEREUPON counsel for plaintiff asked of said witness the following question:

"Mr. STONEMAN.—Well, what influence did it have and why was the phrase 'as per *addenda* for extras upon proposals accepted' inserted in the contract as finally signed, in so far as the substructure work was concerned?

A. So that any alterations made in the substructure other than—over those that were shown on the original plans would be paid for as per the unit prices shown in the *addenda.*"

THEREUPON counsel for defendant moved to strike said answer on the ground that the answer was a conclusion by way [100] of interpretation of the contract which forestalls the Court in its construction. That the contract was clear and plain and unambiguous. Which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREUPON the following question was asked of said witness by counsel for defendant:

"Mr. STONEMAN.—Was there any attempt by either you or Mr. Perkins at that time to reach a figure as to what additional money would be re-

(Testimony of Louis F. Mesmer.)

quired to construct the bridge according to the suggestions of the County Engineer?

A. Yes, the quantities, the cubic yardage of concrete was figured, the number of extra piles was figured the amount of reinforcing bars was figured, the amount of structural steel required was figured and all of the various items that go to make up the alterations were estimated and they were added on to the contract price of $23,800.00 and then that amount subtracted from the total amount of $28,000.00—figured 28,000 and some odd plus 15,000, to see whether those alterations from the total cost was inside of the available money for the work."

THEREUPON counsel for defendant stated that said answer was wholly unanticipated and moved to strike the same because it was irrelevant, incompetent and immaterial, which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREUPON said counsel for plaintiff offered in evidence a certain blue-print for the purpose of showing changes in the substructure of the bridge, to which offer counsel for the defendant objected for the reason that it was incompetent, irrelevant and immaterial and not one of the plans or drawings attached to the contract and which did not seem to have entered into the contract in any way.

Which objection was by the Court overruled, and said blue-print was admitted in evidence and marked

(Testimony of Louis F. Mesmer.)

Plaintiff's Exhibit No. 20, to which ruling of the Court defendant then and there excepted.

THEREUPON the examination of said witness, Louis F. Mesmer, the plaintiff, continued, and among other things the following proceedings were had: [101]

"Mr. STONEMAN.—Did you prepare or cause to be prepared any further plans showing the difference between the plans and specifications upon which your bid was submitted and the plans and specifications upon which it was agreed the substructure should finally be built which showed the changes?

A. I had Mr. Popert prepare the plan that you have in your hand there. I did not prepare it myself. Mr. Popert prepared it for me. Mr. Popert of the American Bridge Co. prepared it for me.

Q. Are these the plans that you have testified to as showing the changes in the substructure from the plans of construction of the substructure that was included in your bid?

A. They are. They show the difference between the two river piers on the original plan as proposed and as built.

Mr. STONEMAN.—We offer this in evidence and ask that it be marked Plaintiff's Exhibit 21."

To which offer the defendant then and there objected on the ground that it does not appear from anything the witness has stated that the offered plan is anything more than one prepared by Mr. Popert. That it does not show that the County Engineer had anything to do with it.

(Testimony of Louis F. Mesmer.)

WHEREUPON the Court made the following observation:

"The COURT.—No, it does not show it was submitted to him or made with his approval or changes were suggested—

Mr. STONEMAN.—It is not offered for that purpose, if your Honor please. It is offered for the purpose of in a little while of forming the basis of the computation of the extra cost under the flat charges of the additional steel and concrete in place required by the changes.

The COURT.—You expect to show that the work was done in accordance with these plans and changes?

Mr. STONEMAN.—Yes, sir."

WHEREUPON counsel for defendant added to its objections that it would then be purely self-serving and not under the authenticity or approval of the County Engineer or anyone else who might bind the county, and would be in the nature of hearsay as well as incompetent.

WHEREUPON the following proceedings were had:

"The COURT.—Was it submitted to the County Engineer? [102]

Mr. STONEMAN.—No, sir.

WITNESS.—No, it was just—it was an attempt to show in a picture just what the changes actually were. We have a picture of it showing the original and the revised on the other—it is a picture—an illustrative sketch more than anything else.

(Testimony of Louis F. Mesmer.)

Q. For your own use?

A. For our own use.

The COURT.—You followed it? A. Yes."

WHEREUPON the objection of defendant as above stated was overruled, to which ruling the defendant then and there excepted and said drawing was admitted in evidence as Plaintiff's Exhibit No. 21, and the witness was permitted to testify fully regarding the same and the computations based thereon.

THEREUPON the examination of said witness was continued by plaintiff, the following question, among others, was asked:

"Mr. STONEMAN.—In answering the next question, I will ask you, please, always, in each instance, Mr. Mesmer, give the cost first of the construction under your own plan and specifications and then give the added cost as shown by the changes required by the County Engineer, if you can do that."

To which question counsel for defendant then and there objected to any comparison between the cost of the bridge as originally proposed by that, meaning the proposal which is attached to the contract in evidence, and the bridge as finally built. (Counsel stated that they did not object to any comparison as to the cost between the substructure as described in the complaint and the cost of the substructure as finally completed and put in by plaintiff.)

(Testimony of Louis F. Mesmer.)

The ground of objection to any testimony showing the comparision of cost between the original proposal and the bridge as finally built was stated to be that in the contract there is a certain substructure, definitely and specifically [103] provided to be built by the plaintiff for Navajo County, and that the words in the contract: "substructure to be as follows: as per *addenda* for extras upon the proposal accepted" refer only to extras beyond the substructure that is definitely contracted to be built in the contract, no part of which is designated as an extra. Further that the provision as to extras has no application except the things in the nature of an addition to the contract—after actual construction shall have commenced. That the objection extends to everything else in the way of a comparison of costs on the ground that it is immaterial and that the contract does not cover any so-called extras.

Which objection was by the Court overruled, to which ruling the defendant then and there excepted and the witness proceeded to testify fully to comparative cost.

THEREUPON the examination of said witness was continued by the plaintiff, and the following proceedings were had:

"Mr. STONEMAN.—Q. Are there any other items of extra cost to you that you have not mentioned?

A. Well, the items— The items which read as follows: Extra work and material required by the

(Testimony of Louis F. Mesmer.)

inspector as follows: Drilling holes, reinforcing steel amounting to 1988.4 pounds, and labor furnished the engineer, these amount to $195.62.

Mr. CLARK.—Q. In order that we may know about that, now, aren't those items included in the demand of December 3, 1917—these three last ones —drilling holes— A. Yes.

Mr. STONEMAN.—Just give me an opportunity and I will give you credit for those.

Q. The last three items of $27.14, $138.08 and $31.04 have been paid have they not?

A. Yes, sir.

Q. And they were included in the amount which you claim under the demand of November 5, 1917?

Mr. CLARK.—December 3, Mr. Stoneman.

Mr. STONEMAN.—Q. Were they not?

A. I don't know whether there was any additional work carried on by the inspector after November 1. There may have. It may have all been and never claimed but I would not remember whether there was any work—additional work required by the County Engineer after November 1 or the Government—the [104] county inspector.

Mr. CLARK.—If the Court please, the demand of November 5 does not show any of those items as such, at least. I have it before me here and it does not show anything of that kind or anything that seems to resemble it. There is one general charge there for extra work—material and work of $12,800.00, without any itemization or itemizing.

(Testimony of Louis F. Mesmer.)

The COURT.—Q. Probably included in that item?

A. I think that they were.

Mr. CLARK.—Well, we would not like to be bound by that suggestion that it is included, unless there is something—

The COURT.—No, not unless you know.

A. Well, they were included, unless there was some work done at the request of the inspector after November 1 but I don't think that there was any work, your Honor. The inspector is here and he can speak for himself. I don't think so.

Mr. CLARK.—The point I am making, your Honor, it is hardly likely it would be in the demand of December 3 items if they were included in the demand of November 5. It would be a reasonable inference.

The COURT.—Q. When did those items accrue?

A. During the progress of the work.

Q. You are not able to say just when?

A. I am pretty sure they were all involved in the foundations.

Q. In the early part of the work? A. Yes, sir. Omitting several questions the following proceedings were had:

"Mr. STONEMAN.—Q. Were you present at the meeting of the Board of Supervisors on November 5—December 3 I mean? A. I was.

Q. Where did you spend the day in Holbrook?

A. I spent it in the office of the Board of Supervisors. I was arguing over the—

(Testimony of Louis F. Mesmer.)

Q. At Holbrook? A. The extras. Yes.

Q. Were you arguing over the—What demand were you arguing over, the demand of November 5?

A. The plans?

Q. Demand. [105]

A. I was arguing over the extra work involved in the plan of November 5.

Q. Do you mean the plan or the demand?

A. The demand. Arguing over the extra work. I spent all day arguing over the extra work.

Q. Did the county make any allowance on December 3 of the amount claimed by you under the demand of November 5?

A. We were arguing all day on the—

Q. I wish you would tell the Court just exactly what happened that day.

Mr. CLARK.—If the Court please, we object, because this witness has answered that question and stated that he was unable to say. That was asked, your Honor, a few minutes ago, whether this demand of November 5 included this one hundred ninety-five dollars and some odd cents they were talking about as having been paid in the demand of December 3.

The COURT.—This is a different question. Now, he asks him what happened. He asks him to state what happened.

Mr. STONEMAN.—Q. Well, start in on the morning of that day and tell the Court, as far as you may be permitted to tell, what happened and

(Testimony of Louis F. Mesmer.)

what was done between you and Mr. Popert and the Board of Supervisors.

Mr. CLARK.—Before the witness starts this, we shall object to it on the ground that the plaintiff is precluded as we say, by the receipts, which is a final one, and by his undertaking of the indemnity given on that date and by all of the circumstances surrounding this case. We say that that receipt constitutes or that demand and the warrant for its payment constitutes a full and final payment of all demands."

Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to restate fully his version of what happened before the Board of Supervisors on December 3, 1917, as follows:

"Mr. STONEMAN.—Q. What did you argue about? Can you say all that happened all day long in two sentences? Start in at the beginning and tell what happened and what was done and what the subject of it was and, as near as you can, what was said between you and the Supervisors?

A. Well, we argued over the question of the extras involved by reason of the changes covered by Perkins, by Mr. Merritt's request and by the Engineer's request—the representative of the county on the job. The county absolutely refused to consent in any way to making us an allowance by reason of any of the changes made in the plans at the request of Mr. Perkins embodying Mr.

(Testimony of Louis F. Mesmer.)

Nichols' recommendations. They agreed to pay for the extras involved on the job by reason of the inspector, this $195.00 item; they agreed to pay for the changes involved in the plans by reason of the incorporation of Merritt's request.

Mr. CLARK.—I would like to have the conversation stated as nearly as we can.

The COURT.—Yes, if you can remember the conversation. [106]

Your Honor, there were three supervisors present, and we had a kind of a round robin there. We talked all day over this thing and I am just trying to sum up into a kind of a conclusion as to what was said after the whole day's argument.

Mr. STONEMAN.—Q. Now, what was the subject of the argument? A. Extras.

Q. The demand that you had previously put in in November?

A. Yes, it was the extras that were involved—I had extra in our November demand and this—November 5—I will repeat it again. This November demand, they finally said, 'We will allow this—we will allow the expenses incurred by reason of the changes made at the request of our inspector, first. Second, we will allow the changes in the plan as made at the request of Merritt. Third, we will not allow anything on the changes made in the plan as embodying Perkins' recommendations and Nichols' report as carried out.' Well, we quit at 5 o'clock and I went over from there to Perkins' house.

(Testimony of Louis F. Mesmer.)

Q. And, in the meantime, you had not received any money out of the November demand?

A. No, sir, they would not give me any money and, in order not to disturb my equities, I refused to go on that basis. I then went over to Perkins' house with Mr. Popert and I saw there some of the original calculations involving the extras involved by reason of these changes carried out by the unit prices as per *addenda;* I saw Merritt's letter covering these—requesting these changes and I saw the rough parts of the paragraph covering the substructure and I then went over to Mr. Larson's house and we had—with Mr. Popert and talked with him a little bit and I asked him if there was not some kind of a way of getting out of this thing—I was in desperate straits—and he thought probably there was, and, at his suggestion, we came back—we decided to go back and have another round robin in the evening after the Board convened and we talked again. I told the Board that I would not accept any demand on Merritt's alterations but I would accept the pay for the balance due to make—to complete the original plans and I would accept the additions involved by reason of the inspector on the job. The Board drew up a warrant which was finally on that basis and I left in a huff and went to the station and said 'I am through. I can't do business—'

Q. You say it was final?

A. I will give you the—

Q. Give you 11 and 12?

(Testimony of Louis F. Mesmer.)

A. 11 or 12, one of those.

Q. I hand the witness Plaintiff's Exhibits 11 and 12.

A. The county drew up the Exhibit 12 and I refused to sign this, because it was—because stated for full payment of contract of Winslow Colorado Bridge and I left in a huff and went to the station. When I was there, Mr. Popert says: 'Here, I represent the American Bridge Co. We have got to have some money. I am going back there as a representative of the American Bridge Co. and see if we can't reach some compromise with the Supervisors,' so he went back and had a talk and about an hour or half an hour afterwards, he came back and he says: 'Now, be reasonable, Mesmer. Come on over there and we will talk this thing again,' so I went back again and after considerable argument, in which Mr. Freeman said he was perfectly willing to give me a thousand dollars for my extra foundation but that is as far as he would go and which I said I could not accept, we finally drafted this No. 11—Exhibit 11, wherein it specifically stated just what the $6,204.62 covered. It specifically left out Merritt's alterations. [107]

Mr. CLARK.—Isn't that matter appearing on the face of the demand and it doesn't need any elaboration by the witness? It speaks for itself.

The COURT.—It probably does but he has already testified to it.

A. The reason that I insisted on leaving out Merritt's alterations, over which there was no con-

(Testimony of Louis F. Mesmer.)

troversy and never was any controversy, because that I did not want to embarrass myself by putting the claim with the county—which the county contended was not relevant, in which the claim that they had admitted to be correct. They signed the draft as drawn up and the warrant was drawn for the amount. Before, however, the warrant was drawn, Mr. Larson, District Attorney, drew up a formal release in which I agreed to save the county harmless for all liens of labor or any kind of bills that might be incurred and he turned around to Mr. Popert and asked him if he was satisfied he could get his money out of me; that he owed me the money; and when he told him he thought he would take a chance, they drew a warrant and signed it and I left."

THEREUPON said examination was continued and the following question, among others, was asked of the plaintiff:

"Mr. STONEMAN.—Now, was there at that time any discussion of any claim which you had made against the county, except the claim embodied in the demand of November 5?"

To which question counsel for defendant then and there objected, which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON the examination of said witness was continued and the following question, among others, was asked: [108]

"Mr. STONEMAN.—Q. Wasn't the matter be-

(Testimony of Louis F. Mesmer.)

ing discussed between you and the Board of Supervisors, as to whether or not the Board of Supervisors should pay the whole of the claim as it was included in the demand of November 5 or whether they should pay part of it or whether they should stand upon their original rejection of the whole claim?''

To which question counsel for defendant objected upon the ground that it was leading. Which objection was by the counsel for plaintiff then and there confessed, following the comment of the Court that it was leading. Nevertheless, the objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

''A. The Board would only pay the amount necessary to complete the original plans and specfications, and they agreed to pay the other extras with the exception of the Nichols—or the Perkins' extras, which they would not pay, so that the money that they allowed was in—was an application of first—on the former.

Q. Well, what I want to know, what was being discussed; was it a previous demand or was it?

A. Yes, we were discussing the extra work involved in November—in the November discussion. All of the extra work had been completed before.

The COURT.—Q. November claim?

A. Yes, the extra work had been completed then.

Mr. STONEMAN.—Was the amount of $6,-204.62, which you finally accepted on December 3,

(Testimony of Louis F. Mesmer.)

an amount that was included in the November demand?

A. Well, part of it was, yes."

THEREUPON said witness was further examined in behalf of plaintiff, and the following question, among others, was asked:

"Mr. STONEMAN.—Q. Do you know why the words, 'together with extras herein listed' was placed in there?

A. In order to—"

To which question counsel for defendant then and there objected on the ground that it called for a conclusion and that the instrument itself is susceptible of easy interpretation. [109]

"Mr. STONEMAN.—The witness says that he directed that to be put in there.

Mr. CLARK.—I understand that he did.

The COURT.—Yes, but the instrument itself does not show why that language was used. I think it is proper evidence in explanation of the document. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Yes, the reason for that wording was to differentiate the extras mentioned and specifically enumerated here from the Merritt extras or the extras involved by reason of changes in the plans at the specific request of Mr. Merritt of the Indian Department and the extras involved by reason of

(Testimony of Louis F. Mesmer.)

the changes in the plans at the suggestion of Mr. Perkins.

Mr. STONEMAN.—Q. Did you make any statement to the Board of Supervisors, either at the time or immediately before you signed this demand, as to the reservation of any right that you might have to sue for any amount exceeding the amount of $6,204.00?

Q. What did you say and who did you say it to?

A. Told the whole Board that I reserved the right to sue for the extras involved by reason of the changes in the plans covered by Merritt's extras or the Indian Department extras and the changes in the plans by reason of the incorporation of Perkins' requests.

Q. Do you know whether at that time there was any reference to the extras as being included in the November 5 claim?

A. State that question again. (Question read.)

Q. Those extras that you reserved the right to sue for.

A. They were all included in the November 5 claim.

Q. Did the Board understand—did you say anything to the Board identifying the extras that you claimed the right to sue for as being the extras included in the November 5 demand?

A. That was what we were talking about all of the time, the extras involved in the November 5 claim, yes, sir. The extras of the November 5

(Testimony of Louis F. Mesmer.)

claim was the only subject of dispute or ever was in dispute.

The COURT.—Q. That is all that you are suing for? A. Yes, sir.

THEREUPON, on the 19th day of March, 1924, the examination of the plaintiff, Louis F. Mesmer was continued, and he was asked the following question, among others:

"Mr. STONEMAN.—Q. Isn't the contract, Mr. Mesmer, in [110] that clause of it you have testified to as incorporating the changes from the original specifications, as required and suggested by Mr. Perkins, after the Nichols report was filed, different specifications in that—are the specifications in that clause of the contract sufficient to show the weights of the cylinders and all that different thing?"

To which question counsel for defendant then and there objected on the ground that the specifications are the best evidence.

THEREUPON the following proceedings were had:

"The COURT.—Well, do they show weights and dimensions? A. No, they do not, your Honor."

WHEREUPON said objection of the defendant was by the Court overruled, to which ruling the defendant then and there [111] excepted and the witness was permitted to testify fully as to what the specifications did not show.

THEREUPON said witness upon further ex-

(Testimony of Louis F. Mesmer.)

amination in behalf of plaintiff was asked the following question, among others:

"Mr. STONEMAN.—Q. Could you have constructed the bridge for the sum of $23,000.00 under the original plans and specifications upon which your bid and proposal was based?

A. Yes, sir.

To which question counsel for defendant then and there objected upon the ground that it was immaterial. Whereupon the following proceedings occurred:

"The COURT.—Well, it is already answered. The objections will be overruled."

THEREUPON counsel for defendant moved to strike the answer upon the same ground as stated in support of the objection, which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREUPON, and during the cross-examination of said witness, Lewis F. Mesmer, by counsel for defendant, the following question was asked, among others, of said witness:

"Mr. CLARK.—During the or at the close rather of the conversation there and after the warrant was issued or at the time it was issued on December 3, 1917, you said that the Board asked you to make up some kind of a contract or agreement of indemnity?

A. Well, they—when they would give us the $6,204.62 they stated it would be necessary for us to give them a full release for material or labor bills.

(Testimony of Louis F. Mesmer.)

Mr. CLARK.—Q. Didn't they also say a full release so far as all demands were concerned?

A. All labor and material demands, yes. Any bills that were outstanding by reason of our construction.

Q. No, but didn't they say a full and complete release of every kind of a demand that you might have in connection with the construction of that bridge?

Mr. STONEMAN.—I object to that.

A. No.

Mr. STONEMAN.—Just a minute. I object to the question [112] if your Honor please, as an attempt to contradict the receipt itself. The receipt itself—

The COURT.—Well, I don't know.

Mr. STONEMAN.— —as being the best evidence.

The COURT.—I haven't seen the receipt.

Mr. STONEMAN.—The receipt that Mr. Clark — oh, this is another one.

Mr. CLARK.—This is not a receipt. This is the contract of indemnity that I am talking about.

Mr. STONEMAN.—Is it in evidence yet?

Mr. CLARK.—Not yet, no, sir. I am just leading up to it now, and I have asked the witness a question which I will ask the reporter to read.

(Question read.)

Mr. STONEMAN.—Now, if your Honor please, we object to it on the ground that if the

release itself is in existence that it would be the best evidence as to what it means.

The COURT.—Yes, I think it would.

Mr. CLARK.—While we agree with that, your Honor, but we think, in view of the fact that this has become largely a matter of intention and the evidence on both sides has taken a wide range as to that, we think the understanding under which this particular instrument was executed is as material, at least, as any of the rest of this.

The COURT.—Suppose the conversation showed that it was not with that intention but the indemnity showed that it was, the conversation would be immaterial.

Mr. CLARK.—We intend to show—we avow that we expect to show by our witnesses that this indemnity contract that I am speaking about was executed upon the understanding that there had been and that this was said in confirming the understanding that this $6,204.00 and some cents constituted a complete and final settlement between the parties of all demands. That is what our witnesses will testify to, as we avow."

WHEREUPON plaintiff's objection to said question was by the Court sustained, to which ruling the defendant then and there excepted.

THEREUPON, upon redirect examination of the same witness, Louis F. Mesmer, by counsel for plaintiff, the following question, among others, was asked, of said witness:

(Testimony of Louis F. Mesmer.)

"Mr. STONEMAN.—Mr. Mesmer, can't you put the conditions under which you state that you were paid $6,204.00 by the Board of Supervisors on December 3, 1917—Will you please state to me again your understanding of the conditions under [113] which that payment was made and how you accepted it?"

To which question counsel for defendant objected on the ground that it was not proper redirect; that it has been fully stated by this witness more than once what his understanding was in both direct and cross-examination. That he was asked for all of the conversation and the transcript of the reporter's notes would show that. That to ask the witness for his understanding is to ask for a conclusion and is therefore objected to on that ground as well as that it is not redirect.

THEREUPON the following proceedings were had:

"The COURT.—Well, he can testify as to what he understood at the time—what he understood as to the terms of the—

Mr. CLARK.—We add to our objection that there is not any ambiguity, as we view it, in the contract and that it is susceptible of easy interpretation and speaks for itself."

WHEREUPON said objections were by the Court overruled, to which ruling defendant then and there excepted and the witness was permitted to testify as follows:

"A. The Board—I will give in conclusion this

(Testimony of Louis F. Mesmer.)

thing: The Board said to me as follows: 'We will give you the difference between the amount of 23,800.00 and the amounts we have already paid you, and in addition thereto, we will give you the Dubree extras and we will give you the Merritt extras, but we won't give you the extras involved by reason of Perkins' changes,' and I said, 'Gentlemen, that won't do. I will tell you what I will do. I will take the difference between $23,800.00—'

Q. $23,000.00?

A. Yes. '—and what you have already paid me and the Dubree extras, but I won't take the Merritt extras, because it will cloud the question of the Perkins' extras, which are involved with and a part of, you might say, of the Merritt extras. It is difficult between the two lines to draw just where Merritt's and Perkins' come together."

THEREAFTER, after the examination of said witness had been concluded, the following proceedings were had:

"Mr. CLARK.—Before any further testimony is put on, we desire to move that all of the testimony of Mr. Mesmer as to the value of these extras claimed by him be stricken on the [114] ground: First, that all of those things that he set forth of what was required by the Indian Department are provided for in the contract itself; secondly, on the ground that no demand covering these extras, as testified to by Mr. Mesmer, was filed with the County of Navajo in the manner and form as required by

the Statutes of Arizona within six months from the date of the last item.

The COURT.—You refer to the detailed statement now?

Mr. CLARK.—The detailed statement that he made last was for some $14,000.00 excepting so much of that as relates to changes made by the Indian Department, as the proof may finally appear as to the value of those and, in that connection, we remind your Honor that the witness testified that nothing was put in during the month of November excepting hand rail and some extra drilling and certain painting work and that is all that was done. In other words, that was all on the superstructure. All of these other improvements go to the substructure and on the further ground that under the *addenda* clause, as claimed by the plaintiff himself, none of those things were required or done after construction had commenced.

The COURT.—Well, now, what do you say as to the proposition of the Board entertaining a claim that does not contain a detailed statement that the statute seems to require and passing upon it and allowing a part of the claim? Don't they waive that?

Mr. CLARK.—If the Court please, that might have some forcibility to that, if it were not for the fact that in the final statement that was presented on December 3, 1917, the plaintiff himself says that those prior payments were made upon the contract

(Testimony of W. H. Popert.)

price and not upon any extras. They show it upon the face of the demand.

The COURT.—The testimony shows that in the claim of $6,204.62 allowed on December 3, 1917, a part of that claim included extras.

(Further discussion.)

The COURT.—I think, perhaps, if the Board had directly ignored that claim and made no allowance on it and refused to consider it, on the ground that it was not properly itemized there might be some force in the argument, but they took that claim up and they considered it and they went into it in detail and they had to do that in order to segregate the number of extras that were allowed in the warrant for $6,204.62. The motion will be denied."

To which ruling the defendant then and there excepted.

THEREAFTER, further to maintain and prove the said issue on his part, the plaintiff called as a witness W. H. Popert, who being first duly sworn, testified in behalf of the plaintiff, and was asked the following question, among others:

TESTIMONY OF W. H. POPERT, FOR PLAINTIFF.

"Mr. STONEMAN.—Could the bridge have been constructed for $23,800.00 exclusive of these modifications?" [115]

To which question counsel for defendant then and there objected on the ground that it was immaterial,

(Testimony of W. H. Popert.)

which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON the witness answered as follows:

"A. The bid calls for a construction of a bridge in the amount of $23,800.00, using the materials as called for on design No. 4183. The modifications suggested in the Nichols report and as agreed to by Mr. Perkins did involve considerable material more than that show on drawing No. 4183."

THEREUPON counsel for defendant moved to strike said answer on the ground that it was not responsive. Whereupon the following proceedings were had:

"The COURT.—The question was, could it be built for $23,800.00 as modified?

A. The cost to Mesmer & Rice would have been—I mean involving—including the modifications as desired by Nichols and Perkins would have been considerably more than $23,800.00."

Which answer defendant then and there moved to strike on the ground that it is not responsive. Thereupon the following proceedings were had:

"The COURT.—No, the question is, could the bridge as modified by the plans acceptable to the Indian Department be built for the $23,000.00—$23,800.00 specified in the contract? Is that the question?

Mr. STONEMAN.—That is the question.

A. My answer is no."

To which answer counsel for defendant renewed the motion to strike adding the ground that it was im-

(Testimony of W. H. Popert.)

material, which motion was by the Court denied, to which ruling the defendant then and there excepted.

THEREAFTER, and during the same examination of said witness on behalf of plaintiff, the following question, among others, was asked of him:

"Mr. STONEMAN.—Q. Now, with reference to the phrase [116] as it appears in the contract by Plaintiff's Exhibit 3, 'substructure to be as follows: as per *addenda* for extras upon the proposal accepted.' Do you know how that phrasing happened to be inserted, not only in this memorandum, being Defendant's Exhibit 'A,' but finally in the contract? Do you know? Say yes or no, please.

A. Yes, I know.

Q. Now, go ahead and tell the reason why."

To which question the defendant then and there objected on the ground that it was immaterial, which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. As I remember, in the original pencil draft, of which this is, I believe, a copy, we wanted to be sure that any materials to be furnished above that show on the original blue print and called for in the original proposal should be paid for irrespective of the description which might follow after here. I can't say whether I inserted this or the engineer or the attorney but it was agreed upon at that time in the conference that these words should appear in the contract or words similar in effect which

(Testimony of W. H. Popert.)

would be satisfactory to the County Attorney. Does that answer the question?"

THEREUPON the following question was propounded to said witness by counsel for plaintiff:

"Mr. STONEMAN.—Is there any reason why it was not possible at that time to say that the bridge should be built for $23,800.00, or for any other sum?"

To which question the defendant then and there objected as calling for a pure conclusion, and as covering matters already testified to by this witness, which objection was by the Court overruled, to which ruling the defendant then and there excepted, and said witness was permitted to testify as follows:

"A. The proposal called for the construction of a particular bridge for a particular price. It was known that there would be certain modifications to be made. It was not possible to anticipate those modifications before the contract was executed. Further, the contractor believed that it would not be legal to modify the price named in the original proposal."

Thereupon the following question was propounded to said witness by counsel for defendant: [117]

"Q. Was there any discussion between you and Mr. Mesmer and Mr. Perkins, the County Engineer, as to the meaning of the phrase "substructure as per *addenda* for extras herewith?

A. There was discussion.

Q. What was said?"

(Testimony of W. H. Popert.)

To which question counsel for defendant then and there objected on the ground that it was immaterial, that being a legal matter and could not bind the County of Navajo. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"Mr. STONEMAN.—What was said and who said it and what was discussed?

A. Well, in order to save the time, I will make my answer as brief as possible. The sum and substance of the discussion was that if there should be any alterations—any additions to the original plan and bid that they should be paid for as provided by the proposal."

THEREUPON the following question was propounded to said witness by counsel for plaintiff:

"Mr. STONEMAN.—Was there any question at that time expressed by Mr. Perkins—any claim by him that Mesmer & Rice were to construct this bridge with these changes suggested by him for the sum of $23,800.00?"

To which question the defendant then and there objected as leading and immaterial, which objection was by the Court overruled, to which ruling the defendant excepted and the witness was permitted to answer as follows:

"A. I will say that the understanding was that whatever additional material was required to that called for in the original plan and bid would be paid for."

(Testimony of W. H. Popert.)

THEREUPON the following question was asked of said witness by counsel for plaintiff:

"Mr. STONEMAN.—Did Mr. Perkins say anything to you before the contract was signed as to whether or not he understood that the substructure commencing in the paragraph of Plaintiff's Exhibit 3, being the contract where 'substructure' is used, where to be paid for at the unit prices or were to [118] be paid for as per *addenda* for extras or were to be paid for out of the flat sum of $23,800.00?"

To which question counsel for defendant then and there objected on the ground that it called for a conclusion and hearsay and was immaterial, which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. In a few words, the extra material as roughly described in contract for the substructure, extra material over that show on the blue print, 4183, should be paid for at the unit prices specified in the proposal. Well, I am trying to save my words and time as much as possible."

THEREUPON the following question was asked of said witness by counsel for plaintiff:

"Mr. STONEMAN.—Have you made a calculation, Mr. Popert, of the different items of materials used in the substructure for the purpose of showing the cost of the substructure based upon the prices used in the contract under the *addenda* clause. Have you made a calculation, yes or no?

(Testimony of W. H. Popert.)

A. Yes, I have.

Q. Will you read into the record the result of that calculation. A. May I refer—

Q. Have you made some notes for that purpose?

Mr. CLARK.—Are you asking (items) unpaid for to be read into the record?

Mr. STONEMAN.—Yes."

To which question defendant then and there objected on the ground that it was immaterial and that it was a matter to be determined by the Court itself. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify at length as to the result of his calculation.

THEREAFTER, on the 20th day of March, 1924, the said witness, William H. Popert was recalled for further redirect [119] examination and among other matters was asked the following question:

TESTIMONY OF WILLIAM H. POPERT, FOR PLAINTIFF (RECALLED — REDIRECT EXAMINATION).

"Mr. STONEMAN.—Have you made a computation for the purpose of showing the cost of the material used in the construction of the bridge under the requirements of Mr. Perkins? A. I have.

Q. Is it itemized as to the different character of material? A. It is.

Q. Will you please give me the results of your computation?"

(Testimony of William H. Popert.)

To which question counsel for defendant then and there objected on the ground that it was immaterial as the matter was already settled by the contract and because no demand was ever presented to the Board of Supervisors within six months from the furnishing of these items. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as to the items embraced in his computation, showing a total of $13,900.00.

THEREAFTER, and during the direct examination of said witness on behalf of plaintiff, the following proceedings were had:

"So that, until those supplemental plans and specifications had been approved by the Indian Department it was not possible was it, under the contract itself, to determine what either the extent of the changes, which in this case have been called extras, or the quantity or amount of the changes?

A. No, it was not possible to determine that.

Q. Now, did that consideration have anything to do with the wording of this clause of the contract as it was worded, that is, that all of the preliminary specifications stated in the contract were to be paid for as per *addenda* for extras upon the proposal accepted?

Mr. CLARK.—Now, we object to that, if your Honor please, as immaterial and calling for a conclusion, and for the further reason that that very phrase, the so-called *addenda* phrase, is in the bid

(Testimony of William H. Popert.)

and proposal of this plaintiff made long before this contract was ever made or any part of it.

The COURT.—No, the objection is overruled."

To which ruling the defendant then and there excepted. [120]

THEREAFTER the following question was asked of said witness by counsel for plaintiff:

"Mr. STONEMAN.—Now, did you prepare this November claim identified as Plaintiff's Exhibit No. 10?

A. I prepared it or assisted in its preparation. My name appears signed after Mesmer and Rice, using the words 'attorney in fact.'

Q. That November claim appears to be divided into two parts, one part according to the interpretation of the contract placed upon it by the Board and the other part according to the interpretation placed upon the contract by Mr. Mesmer. Is that true and was that intended by you to be shown'?

Mr. CLARK.—Are you speaking of the demand of November 5?

Mr. STONEMAN.—Yes, sir.

Mr. CLARK.—Well, we object. It is immaterial.

The COURT.—It speaks for itself?

Mr. CLARK.—The demand shows upon its face just what it is.

Mr. STONEMAN.—All right. That is satisfactory.

Mr. CLARK.—That is, in so far as it states anything.

(Testimony of William H. Popert.)

Mr. STONEMAN.—Now, I don't know just what counsel means.

Mr. CLARK.—Well, I mean exactly what I said.

Mr. STONEMAN.—All right, then. I repeat the question.

The COURT.—Where is that claim? This is the claim for $17,776.00? (Exhibit given to Court.) This answer is merely an explanation of those two items. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"That is a correct—If you mean that the second paragraph should be in with the first paragraph in the contractor's interpretation—the two should be added together."

THEREAFTER, and during the same examination, the following question was asked of said witness:

"Mr. STONEMAN.—Q. Either at the meeting held in November or at the meeting held in December was there any complaint expressed by any member of the Board of Supervisors that the demand of November 5 had not been properly itemized?"

To which question counsel for defendant objected as immaterial, which objection was by the Court overruled, to which [121] ruling the defendant then and there excepted. The witness in the meantime having answered, "No, sir."

THEREUPON, and during the same examination, the following question was asked of said witness:

(Testimony of William H. Popert.)

"Mr. STONEMAN.—Did you hear at that meeting on December 3 any member of the Board of Supervisors offer to pay any additional money to the Merritt extras and the sum of $6,204.00?"

To which question counsel for defendant objected on the ground that it was immaterial and upon the further ground that whoever made such statement offered it as a compromise that was unaccepted, proof of it would be inadmissible in any event.

WHEREUPON counsel for plaintiff stated as follows:

"Mr. STONEMAN.—It is not for that purpose. It is for the purpose of showing that it was the November demand which was in contemplation and being considered."

Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Your Honor, I can save time by saying, while I don't remember the exact name, I know that the Board felt as though they wanted to pay something —they wanted to do something to have the contractor satisfied and one of the members of the Board said that he would pay a thousand dollars extra and asked if that was satisfactory to Mr. Mesmer. Does that answer the question?

Mr. STONEMAN.—That is, for the purpose of closing the whole transaction? A. Yes.

The COURT.—Q. But you do not recall the name of the member of the Board who made that statement? A. No, I do not recall who it was."

(Testimony of William H. Popert.)

THEREAFTER, and during the cross-examination of said witness by counsel for defendant, the following question among others was asked:

"Mr. CLARK.—Did you have anything to do, Mr. Popert, with preparing or assisting in the preparation of the original bill in equity that was filed in this court by Mr. Mesmer? (No answer.)

Q. What is the answer: [122]

Mr. STONEMAN.—I object to the question because it is too general. If counsel has in his mind any particular thing which this witness—He don't pretend to be a lawyer—had to do with that, I ask that he direct his attention to it.

Mr. CLARK.—I will put it a little differently.

Q. Did you have anything to do with furnishing the information to Mr. Stoneman upon which that bill in equity was drawn? Did you consult with him as to any of the information used by him in making up that complaint at all?

Mr. STONEMAN.—I object.

The COURT.—What is the ground of your objection?

Mr. STONEMAN.—We object to it on the ground that it is irrelevant and immaterial as to any of the issues in this case, unless—

The COURT.—And not proper cross-examination?

Mr. STONEMAN.—And not proper cross-examination or unless it is an attempt to impeach the witness, in which event no proper foundation is laid, in that this witness—

The COURT.—The objection is sustained.

Mr. CLARK.—I will put it upon another ground. As to my intention to attempt to impeach the witness, your Honor—It is my intention to show that at the time this complaint was filed, it was the theory and, in fact, the position of the plaintiff that the extras mentioned here—

Mr. STONEMAN.—Please tell me where you are reading from.

Mr. CLARK.—Paragraph 4 of the bill of equity. That is the instrument that I have referred to. That the extras furnished were furnished in this way and now I will read from paragraph 4. 'Complainant avers that under the terms of such contract he entered upon the construction of such bridge but that thereafter from time to time during the performance of the labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to require of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras as set forth in said proposal, contract and specifications.' The point being that it was after the construction had commenced, as is stated here, that these changes were required.

Mr. STONEMAN.—Well, now, if that is the point, if your Honor please, I assert that the question is not justified by the reading of the allegations of paragraph 4 itself, that it refers to other changes.

The COURT.—From time to time.

Mr. STONEMAN.—That the changes were not contemplated except in so far as the expense incident to making such changes and alterations should be paid for as per the schedule for extras—charged for extras.

Mr. CLARK.—According to the theory of plaintiff, your [123] Honor, all of them are to be paid for under that *addenda* and it is now claimed, not that these changes were required after construction had commenced, but that they were required largely before even the contract was signed and some of them after the contract was signed, but not a single one, as the record stands now, after construction had commenced. Not a single one. That is the status of the record here.

Mr. STONEMAN.—The further ground of objection, if your Honor please, that even if a statement of facts is in paragraph 4, which I do not admit, that neither the plaintiff nor this witness could be bound by it. It would be my mistake and not his.

Mr. CLARK.—Well, now, if the Court please, we do not say that they are bound by it positively. That is not our contention. We say that a pleading

(Testimony of R. C. Cresswell.)

filed by a party may be used as evidence only and I do not claim that it is absolutely binding but I think it is pretty strongly persuasive in all cases."

Which objection was by the Court sustained, to which ruling the defendant then and there excepted.

TESTIMONY OF R. C. CRESWELL, FOR DEFENDANT (CROSS-EXAMINATION).

THEREAFTER, Mr. R. C. CRESWELL, having been heretofore duly sworn, was called as a witness in behalf of the defendant, and upon his cross-examination the following proceedings were had:

"Mr. STONEMAN.—Q. Did you not know that when the bridge was finally constructed by Mr. Mesmer that it was not being constructed by Mr. Mesmer that it was not being constructed under the proposal and the plans and specifications originally submitted by him.

Mr. CLARK.—We object to that for the reason, as stated in our preceding objection, and further upon the further ground that the contract at that time controlled and that the contract speaks for itself as to those matters.

The COURT.—Objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"The COURT.—Did you not know at the time this bridge was being constructed that it was not

(Testimony of R. C. Creswell.)

being constructed under the plans and specifications as made in the proposal of Mr. Mesmer before the contract was accepted?

Mr. STONEMAN.—Before the award was made.

The COURT.—Before the award was made. Did you not know that the bridge was not being constructed in accordance with those plans?

A. Well, there was some little heavier parts but, as [124] I understood from the Engineer at that time, it did not amount to but very little.

Mr. STONEMAN.—Q. Didn't you know that the piling was being driven ten feet below the depth that it was intended to be driven under the original specifications? A. No, sir.

Q. Didn't you know that the piers were more than two feet greater in diameter than the piers were in the original specifications?

A. It was some larger but I don't remember how much.

Q. Didn't you know that there was additional thickness in steel in the pier cylinders?

A. Yes, sir.

Q. Didn't you know that a much greater yardage of cement would necessarily be used in the changes that would have been used by Mr. Mesmer under the original plans? You must necessarily have known that?

A. Well, of course, there would be some more but I did not know—I never did think there was a great deal."

(Testimony of R. C. Creswell.)

Omitting several questions said witness testified as follows:

"Q. Did you ever make any attempt to figure the weight of the excess material either in steel or cement?

(No answer.)

A. Did you? A. Sir?

Q. Did you ever make any attempt—Did it concern you at all as to the cost of the contract of all this extra material?

A. Why, yes, we got all of the information we could from our engineer.

Q. Did you read the letter that had been sent to you by Perry F. Borchers, Assistant Commissioner of Indian Affairs? A. I guess I did.

Q. With reference to that bridge?

Mr. CLARK.—If the Court please, I don't think the record will show that any letter was sent by Borchers to the Board of Supervisors.

Mr. STONEMAN.—No, I said sent to him. I did not say Board of Supervisors—sent to Mr. Creswell personally, my question is.

The COURT.—Yes, that is a fact.

Mr. STONEMAN.—You read that, did you?

A. Yes.

Q. Did you read in that letter that Mr. Borchers had said that the $23,800.00 appropriated by the County and $15,000.00 more—that with the $28,000.00 of the bond issue appropriated by the county for the building of the T-3 bridge over the Little

(Testimony of R. C. Creswell.)

[125] Colorado together with the $15,000.00 of the Government there would be $43,000.00 which he thought would be amply sufficient to pay for the increased cost? Did you read that in Borcher's letter or words to that effect?

A. Yes, I read that in the letter.

Q. Didn't that suggest to you, if nothing else, that the changes required by the Indian Department would necessitate a greater cost in material, labor and steel structure?

A. Well, that extra expense did not all go to Mesmer & Rice. We put on another steel span there by another company and built the bridges.

Q. That had nothing to do with it at that time, did it? A. No, sir.

Q. This $15,000.00 could only be used on the Little Colorado bridge, couldn't it?

A. It was used on the bridge.

Q. What are you talking about? You could not have used this $15,000.00 on another bridge if you had wanted to?

Mr. CLARK.—We think counsel is unfair with the witness. The witness says that $15,000.00 was used on the bridge, but it was used in building an extra span.

The COURT.—Yes, extra span on the same bridge.

Mr. CLARK.—Yes, and not in the contract with Mesmer & Rice at all.

Mr. STONEMAN.—Q. In other words, up to the

(Testimony of R. C. Creswell.)

time that you settled, as you claim, with Mesmer, then you still had that $15,000.00 in your pockets, didn't you?

A. No, we did not have it in our pockets.

Q. You had it in the County Treasurer's Office?

A. Yes.

Q. And had not spent a cent of it, had you?

Mr. CLARK.—If the Court please, that is wholly—

Mr. STONEMAN.—Q. Never used it for the payment of the construction of some work

The COURT.—It has been answered.

Mr. CLARK.—Well, we move to strike it then.

The COURT.—It may stand. The motion is denied.

Mr. STONEMAN.—Q. So that, as I understand you now, you got this $15,000.00 you got the bridge built for $23,800.00 and did not have to spend any of the $15,000.00, is that it? A. Oh, yes.

Q. On this bridge—on this particular bridge?

A. Yes, sir. [126]

Q. That is true, isn't it, according to your testimony?

A. We spent some $41,000.00 on this bridge.

Q. Afterwards. After the payment, as you claim was made to Mesmer on December 3, 1917? That was all after that, wasn't it? A. Yes, after that.

Q. All right, and then some floods came up and they washed away some of the approaches to this

(Testimony of R. C. Creswell.)

bridge built by Mesmer and you had $15,000.00 to put another span on it, didn't you? A. Oh, no.

Q. What did you use that for?

A. We had to build the approaches to get onto the bridge. When Mesmer & Rice quit the bridge, you could not get on there short of a twenty foot ladder.

Q. Didn't you accept the bridge on the 3d day of December?

A. Why, we accepted their work, as far as it went, yes, and paid them for it.

Q. And according to this contract?

A. Yes, sir.

Q. And according to Perkins' report?

A. As far as I know, yes, on Perkins' report.

Q. Then you spent $15,000.00 on top of it?

A. As I told you, we spent $41,000.00 on that bridge before it was completed.

Q. Before it was completed? A. Yes, sir.

Q. Why didn't you certify that it was completed and make a final payment on it on December 3?

A. Well, so we could use it, I mean—when I mean completed—

Q. Just what do you mean now?

A. Well, I mean completed so we could get over it with teams and automobiles.

Q. Just a minute.

The COURT.—Q. Didn't you accept that bridge as completed from Mesmer & Rice?

A. Under the contract, but I say we built another

(Testimony of R. C. Creswell.)
steel span on there of 120 feet and then the wooden approaches on that, which run the total of that bridge up to $41,000.00" [127]

THEREAFTER counsel for the plaintiff continued the cross-examination of said witness asking of him, among others, the following question:

"Mr. STONEMAN.—Didn't you know, Mr. Creswell, that Mr. Mesmer, in addition to the amount that he said that he would build this bridge for originally under his original proposal and specifications would have to pay out more money for material if he built it under the specifications as recommended by Jordan—by Perkins, your county engineer?"

To which question counsel for defendant objected on the ground that that was assumed by the contractor in his contract, that it was immaterial and is a matter that is determined by the contract which speaks for itself. That counsel was attempting to make this witness practically interpret the contract, something that the Court was to do. Which objection was by the Court overruled, to which ruling the defendant then and there excepted, and the witness was permitted to answer, saying "No." That it was his understanding that they were to build a bridge for the contract price of $23,800.00.

THEREAFTER, and during the same cross-examination, counsel for plaintiff asked the following question of said witness:

(Testimony of R. C. Creswell.)

"Mr. STONEMAN.—Now, when you submitted the Perkins' changes to the Indian Department, it was for suggestions as to whether or not any further changes might be required, wasn't it?"

To which question counsel for defendant objected on the ground that it was immaterial because the same thing had been shown time after time. That the time within which the defendant could present its case was going to be short if such cross-examination were pursued. Which objection was by the Court overruled to which ruling the defendant then and there excepted and the witness was permitted to answer, his answer being that he did not know.

THEREAFTER, the defendant closed its case. [128]

THEREAFTER, on the 21st day of May, 1924, the defendant filed and served upon counsel for plaintiff its motion for judgment as follows:

"Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:

1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435, Revised Statutes of Arizona.

2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called 'extras' which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6th. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement

with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge and which were set forth in the contract, were to be paid for as 'extras.'

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction. [129]

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a 'memorandum of points and authorities,' in support of this action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant."

Which motion was, by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plaintiff for the sum of Thirteen Thousand Eight Hundred and Seventy-two 65/100 Dollars ($13,872.65) denied, to which ruling, under and by virtue of this objection to said judgment, the defendant duly excepted.

After both sides in response to request heretofore made by the Court had announced that they had no further testimony to offer and the Court having thereafter for the benefit of respective counsel announced its views upon the weight of the evidence and the construction of the contract sued upon, and having requested counsel for both sides to submit briefs upon the law and upon the evidence and neither plaintiff nor defendant having requested special findings either of fact or of law, and having, on the 8th day of July, 1924, directed the Clerk to enter the judgment of the Court in favor of plaintiff for the sum of Thirteen Thousand Eight Hundred Seventy-two and 65/100 Dollars ($13,872.65) and judgment having been by the Clerk on said date so entered, defendant was by the Court permitted an exception to the entry of said judgment.

The attorneys for the plaintiff in error, the defendant below, having tendered this as the defendant's bill of exceptions to the rulings of the Court upon the trial of and to the motion for judgment and to the judgment rendered in this action, all within the period embraced in the extensions or allowances in addition to the time allowed by law from and after July 11, 1924, upon which date defendant was notified of said judgment, which extensions were granted by order of Fred C. Jacobs, judge of [130] said court, before the period previously allowed had elapsed, and have requested that the signature of said Judge and the seal of

the court should be annexed to the same pursuant to the statute in such cases made and provided, that said exceptions be settled and allowed, and certain amendments having been proposed to said bill of exceptions, No. one of which proposed amendments was denied, number two thereof was allowed, number three was withdrawn, numbers four, five, six, seven and eight were allowed, and in addition to the allowance of amendment number eight, as proposed by plaintiff, the defendant was permitted to add to said proposed amendment, the testimony of the matter contained in the last six lines at the foot of page 42 and all of page 42–B. And said Judge, pursuant to said request, has settled and allowed said exceptions and has placed his signature to this bill of exceptions, and caused the seal of said court to be affixed thereto, this 25th day of October, 1924, and ordered same to be filed.

F. C. JACOBS,
Judge. [131]

EXHIBIT No. 6.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs,
Washington.

Edu–Constr.
1000059–16.
99186–16.
A E M.

September 27, 1916.

Mr. R. C. Cresswell,
Chairman Board of Supervisors,
Holbrook, Arizona.

Sir:

Following Office telegram of the 25th, you are informed that examination of the specifications and drawings covering the construction of the proposed bridge across the Little Colorado River near Winslow, Arizona, shows that there are some structural defects which must be corrected and positive assurance given the Government that the location of the bridge and elevation of floor above the extreme high water line on record will not subject the bridge to danger from floating trees, logs and other debris.

Mr. Perry B. Borchers, Engineer representing the Office, visited the proposed site and submitted drawings showing that the bridge spans do not extend to the river bank at either end and to reach the spans timber trestles, protected by piling rifraf are to be erected. This construction will

constrict the width of the channel at this point to 500 feet which will in turn raise the high water mark, and as the drawing show that its elevation gives a clearance of but 10 inches from soffit of floor beams and about 2′ 0″ from that of the trusses, the danger from impact and accumulation of drift is manifest and should be avoided by raising the bridge 3′ 0″ and increasing the length of the tubes proportionately unless it is established beyond a doubt that the character of the drift is such that 10″ clearance is sufficient.

Structural defects shown by checking are as follows:

1. The metal in the tubular piers is too light for the diameter of the tube, it should be increased from ¼″ to ⅜″ down to the river bed and 7/16″ below the bed of the river. Abutment piers might be 1/16″ thinner throughout than indicated above. The angle bracing of the piers is also poor design as it is in danger from floating drift. Piers should be connected by a solid web. This might be either concrete as suggested in the specifications of Mesmer and Rice or a steel *diaphgram.* Either construction should be knee-braced to the pier.

2. The cover plate of the top chord and end posts is too thin for the distance between rivet lines, it should be increased from ¼″ to 5/16″.

(b) The two center panels of the lower chord have [132] insufficient cross section, they should be increased from 4 angles 4″x3″x⅜″ to 4 angles 5″x3″x⅜″.

(c) The lower lateral bracing has insufficient cross-section in the end panel and in the third panel, sizes should be increased from 1 angle 3″x3″x⅜″ to 1 angle 4″x4″x5/16″, and from 1 angle 3″x3″x¼″ to 1 angle 3″x3″x⅜″ respectively.

These, while essential to bringing the design up to the standard of the best practice in bridge designing and construction, will not add greatly to the cost of the structure, and in all probability the preferred bidders will incorporate the desired changes without extra charge in order that an award may be approved by the Secretary of the Interior and the work started at an early date.

You will please take this matter up with Messrs. Mesmer and Rice, the preferred bidders, and also with the Engineers for the County, State and Santa Fe Ry. Company, and advise this Office as to the result, for, before the matter is referred to the Secretary of the Interior for approval, the preferred bidders must agree to remedy the structural defects as herein set forth, and the assurance by the Engineers referred to must be given that the location of the bridge and elevation of its floor, will not subject it to flood damages.

There must also be incorporated in the contract a clause, providing for the approval of all shop drawings by the Commissioner of Indian Affairs, before any fabrication is started and the inspection of all material and construction by a Government representative at any and all times.

Respectfully,

(Signed) E. B. MERITT,

Assistant Commissioner. [133]

EXHIBIT No. 9.

Referred to Co-Engr. for report.
(Rejected.)
11/5

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Arizona, Oct. 1, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of ——— Dollars For as listed below—Winslow bridge, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND.

As per original contract & original PLANS Structural steel-deld. 147 ton @ $120.00	17,640.
Lumber and Piling	600
Concrete in Piers	1,100
Cylinder Steel—part in place	1,400
Piling in place (not including material)	600
Value of Material	21,340
Less 20%	4,270
	17,070
For extra mat'l. and labor (part in place) deductions made	10,600
Amount paid on account	27,670
	12,624
Balance Due	15,040

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

MESMER & RICE,
By WILLIAM H. POPART,
Attorney-in-fact.

Sworn to and subscribed before me the 1st day of October, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors,
Notary Public.

My commission expires:
Filed 10/1/17. R. S. Teeple, Clerk. [134]

EXHIBIT No. 10.

Rejected.
11/5/17.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz., 11/5/17.

MESMER & RICE Presents this demand on the County of Navajo for the sum of $17,776.00 ———

Dollars for Winslow Bridge—as given below, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND.

	Dollars
Material and labor, as per original PLANS and original contract, but not including work not yet completed	22,000.00
Less 20%	4,400.
	17,600.00
For extra materials and labor, including work ordered by County's inspector and including assistance on surveys for which deductions have been made for part not complete, and on which 20% retained, net	12,800.00
Total	30,400.00
Amount paid on account ...	12,624.00
Balance due	17,776.00

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that

the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

MESMER & RICE,
By WILLIAM H. POPERT,
Attorney-in-fact.

Subscribed and sworn to before me the 5th day of November, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors, Notary Public.

My commission expires:

For value received I hereby assign this demand to ———.

———————————.

Filed 11/5/17. R. S. Teeple, Clerk, Board of Supervisors, Notary Public.

Approved and ordered paid for $4976.00.

Rejected 11/5/17. [135]

EXHIBIT No. 11.
DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Arizona, Dec. 3d, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of Sixty-two hundred and Four and 62/100 Dollars balance due to complete the amount of $23,800.00 on contract, for Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND.

Contract price	$23,800.00	
Labor drilling holes	27.14	
1958. 4# reinforcing steel	137.08	
Labor furnished engineer	31.40	
		23,995.62
LESS		
Previous payments .	17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		6,204.62

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct in every particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) LOUIS F. MESMER.

Sworn to and subscribed before me December 3, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors, Notary Public.

My commission expires:

For value received I hereby assign this demand to:

Demand No. 1.

Warrant No. 426.

Filed Dec. 3d, 1917. R. S. Teeple, Clerk Board of Supervisors.

Approved and ordered paid by WI-COLO BRIDGE FUND.

$6204.62.

R. W. CRESWELL,
Chairman. [136]

EXHIBIT No. 13.

Holbrook, Arizona, Aug. 9, 1916.

To the Honorable Board of Supervisors,
Navajo County.

Gentlemen:

At your request we have considered the proposals for the construction of seven bridges presented to your Honorable body by various contractors under date of July 1st, 1916.

We have found among these a great mass of valuable suggestions. We consider that the majority of these propositions are worthy of serious consideration.

We wish to express our appreciation of the assistance and co-operation of Mr. Chas. E. Perkins,

County Engineer. His detailed examination of the plans submitted shows careful consideration of important details, and we are in substantial agreement in regard to his recommendations.

We wish to emphasize the importance of his recommendation in regard to the foundations of these various bridges on consideration. In this connection we would respectfully recommend that cylinder piers should be at least sixteen feet deep below the river bottom and should have a minimum diameter of 72 inches. In cases where hard foundations can be found at shallower depth than above, we would recommend mass concrete piers in place of cylinders. Wherever the material is found to be unstable or quick sand at the extreme depth mentioned above we would respectfully recommend that piles be driven within such steel cylinders entirely through such unstable material or quick sand to a firm bearing. In case no such firm material is found we would recommend that *forth* foot piles be driven for their full penetration below the bottom of the cylinder.

In connection with the selection of the proposal to which the contract should be awarded for the construction of the seven bridges concerned, we wish to commend the methods followed and the conclusion reached by your County Engineer. The amount of money at the disposal of the Board would seem to make the recommendation of your County Engineer entirely satisfactory and reasonable. Our own preference however would be for a heavier and more expensive type of bridge.

With certain modifications we should recommend to your Honorable body the construction of the bridge over the Little Colorado River near Winslow, Contract No. 1, according to the plans and specifications submitted by Mesmer and Rice, Engineers and Contractors, Marsh Strong Bldg., Los Angeles. With proper concessions in the matter of price, we should recommend the steel structure designed for carrying concrete floor but for the immediate present the use of a wood floor thereon. We should recommend the three span structure having 14-foot road way. All piers and abutments should be built of mass concrete extending 16 feet below river bottom and should rest on piles having about 30 feet additional penetration. In this connection we believe that the prices given for extras by this firm are excessive and should be modified if contract is awarded to them.

We would recommend the selection of a similar design by [137] the same firm for Contract No. 3, except that at that point, we would select design mentioned in their proposal as "c" with wood floor and wood joints.

On all other contracts we would recommend the designs of the same firm having 14-foot roadway, steel joists and wood floor but with this modification: We would prefer that the top chord should be fabricated from channel irons and plates rather than from angle irons and plates.

While we are fully aware of the importance of the monetary considerations involved we wish to urge as strongly as possible a selection of relatively

heavy type of bridge. We are fully convinced that no one can estimate fairly the importance of and extent of the traffic that will pass over these bridges during the next few years. We are firmly convinced that the development of this traffic will far exceed the expectations of the most optimistic. We would respectfully urge upon your Honorable body that provision should be made for the development of a traffic of from four to five hundred motor vehicles a day.

For your further guidance we append below a statement showing the modifications we would recommend in the other designs submitted, provided you should select otherwise than as recommended above.

BIDDER No. 1. Details of plans insufficient.

2. Weight of metal should be increased.

3. Steel should be made heavier, angle irons in top chords should be replaced by channel irons. 1 beams joists should be given greater depth.

4. Prefer structures riveted throughout, do not consider pin connected bridges desirable.

5. Short span designs very satisfactory. Weight of six inch channels, upper chord, eighty foot spans not shown. Lower

chord about 16 per cent lighter than Mesmer and Rice design. Floor joists six inches instead of eight inches.

7. In the eighty foot spans, weight of channel used not shown. Bottom chords 16 per cent lighter than Mesmer and Rice design. Floor joists seven inches deep on 20-foot span as compared with eight inches deep on sixteen-foot span Mesmer and Rice design. They fail to show additional joists for 14 foot roadway. Should show at least three lines of 1's instead of two as shown on plans. Prefer heavier structure throughout.
8. Suspension bridge plan not considered. Other designs, weight of metal should be increased.
9. Details of plans insufficient.

Any bid accepted should be with the understanding that detailed plans showing all details should be submitted for the approval of the County Engineer prior to the mill work and fabrication. [138]

In conclusion we wish to suggest that if necessary in order to bring the total expenditures within

the amount available, it might be advisable to use 12 feet width on the shorter bridges. We suggest further that the amount of funds available should not be the determining factor if it is possible to secure any additional requirements. We would urge your consideration of means to secure the additional amount required and to proceed according to our recommendations herein contained.

Very respectfully submitted,

THOMAS F. NICHOLS,

For State Engineer. [139]

EXHIBIT No. 17.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Los Angeles, California, May 21, 1918.

MESMER & RICE Presents this demand on the County of Navajo for the sum of Seventeen Thousand One Hundred Eighty-nine and 65/100 Dollars, For Balance due to complete contract for Bridge T–3 over Little Colorado near Winslow, the items of which are herein listed:

ITEMS OF THE FOREGOING DEMAND.

Original contract Proposal, 23,800.00	23,800.00
Extras required by Mr. Perkins:	
Cylinder steel, 63,278, @ 7½¢ ..	4,745.00
Superstructure steel, 7, 740 @ 7½¢	580.00
Reinforcing-Bonding upper and lower cylinders 1960#, @ 7¢	137.20

Extra Concrete in cylinders, 236 yds. @ $20.00	4,720.00
Reinforcing in web walls, 1235# @ 7¢	86.45
Extra Concrete in web walls, 29 @ $25	725.00
Extra Piling, 44 Piles @ $15	660.00
Extra Excavation, 136 yds. @ $5.00	680.00
Extra work and material required by inspector:	
Dulling Habs.	27.14
Reinforcing 1958.4	137.08
Labor furnished Engineer	31.40
Additional length of Piling required by Board—original estimate based on Piling 16′ long, 1640	1,640.00
Flood losses as result of delay in approving drawings	3,216.00
	41,185.27
Less previoups payments	23,995.62
Balance due	17,189.65

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgments. Original vouchers and receipts must be retained.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items thereunto annexed are true and correct in every particular and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

LOUIS F. MESMER.

Subscribed and sworn to before me this 21st day of May, 1918.

D. O. MEDDLETON,
Notary Public in and for the County of Los Angeles, State of Cal. [140]

EXHIBIT No. 4.

REPORT OF THE COUNTY ENGINEER UPON PROPOSALS FOR CONSTRUCTION OF BRIDGES.

To the Honorable Board of Supervisors,
Navajo County, Arizona.

Gentlemen:

Responsive to your invitation for bids for the construction of bridges under the proceeds of the recent bond issue for that purpose, there were received at your office on July 3rd, and referred to the Engineer's office for report on this date, proposals from nine separate companies or individuals ag-

gregating in the different combinations of super and substructures, fifteen hundred and forty-three distinct propositions.

This office has diligently worked and reviewed each and every one and on account of structural defects and local requirements 1260 of these proposals have been eliminated. Accompanying this report is a tabulated sheet of the remaining 283 proposals, which graphically presents and compares to you a summary which can be easily and quickly deduced. This office has likewise carefully weighed the advantages and disadvantages of the plans and these costs tabulated.

> "Consultation has been made with the Engineers of the State and those of the A. T. and S. F. R. R. Company."

For the construction of the bridge near Winslow there is an appropriation of $15,000.00 conditioned upon a like amount being appropriated and used by Navajo County for this purpose, making a total of $30,000.00 for the bridge named which is amply sufficient to cover the cost of the super and substructures and the necessary approaches.

This office has certified to the Indian Department that the County of Navajo has appropriated and set apart the sum of $15,000.00 or more, which was and is available to be used for the construction of a bridge east of Winslow, and has had conversation by phone with the agent at Leupp relative to this. Mr. Janus, the agent, gives assurance that the $15,000.00 appropriation by Congress is available, and requested that a copy of the accepted

plans, specifications and construction be forwarded to him.

At this time I suggest and recommend that an invitation be extended to the Indian Department through Mr. Janus, to co-operat*ive* in the construction of the Winslow bridge by detailing an inspection engineer to act jointly with the County Engineer upon that bridge. I think this invitation essential and desirable.

Of the plans presented there are those of a six span bridge, a five span bridge, a three span bridge, a two span bridge and a one span suspension bridge. Although except*ly* desirable at this point, the single suspension span must be eliminated from contemplation for the reasons of difficulties of constructing abutments of [141] sufficient bearing resistance to sustain the weight imposed, and that of one guy terminal falling in the center of stream bed of Cottonwood Creek.

The short spans at this point will entail excessive pier cost in preparing assured foundations which are absolutely necessary.

For the foregoing reasons this office has selected and recommends that a bridge of two spans of 200 and 48 feet, 6 inches each, as submitted and proposed by bidder No. 7 be adopted. The price stipulated is $121,115.00, with the addition of extra cost, for addition length of piling and yardage of concrete and all other items enumerated within the proposal, which with the cost of approaches will consume the total adopted $30,000.00 and more.

In comparing the relative cost of the remaining bridges advertised between the various bidders, it is found that those under No. 7 compare favorably and are the best. In fact, the total cost of the most desirable plans as made by this bidder, assuming $15,000.00 is the sum of the County money to be set apart for the Winslow bridge, is $51,863.00. The only other summary of tabulated bids which less than this stipulates a five span bridge at Winslow and the next highest which also contemplates a five span is $52,110.00; in fact, bidder No. 7 has presented the only proposal for a two span bridge.

In addition to the reasons given in a former paragraph, the expenditure for pier cost can with advantage be concentrated upon one pier at the center of the stream, where the brunt of the current, scour and force of drift are maximum.

The bridges selected and hereby recommended by this office are such as are most suitable to the respective localities, most serviceable, economical, stable and fully meet the conditions contemplated and desired. They are as follows:

(See Tabulation Sheet No. 7.) Bridge No. 1, (T–3) over Little Colorado east of Winslow. 2 spans of 248′ 6″ each.

Piers to be three in number of 2 steel tubes, the center pier tubing of 72″ diameter those at each end of 48″ diameter; 12 to 16 feet below stream level with piling driven within to a refusal sufficient to sustain a load of not less than fifteen tons to each piling; tubes to be filled with a rich concrete mixture; superimposed upon these concrete-filled tubes,

a reinforced concrete pier to be raised to a height of two feet above the level of the bottom chord of the adjacent A. T. & S. F. R. R. bridge. Superstructure to be two pin bow steel spans, 248′ 6″ each resting on the piers specified, 14′ roadway, steel joists, wood 3″ floor, and lattice hand rail.

The foregoing provisions are included in the proposal made.

Bridge No. 2 (T–2) over Cottonwood east of Winslow:

1 Span of 129′ resting on piers of the construction identical with the preceding, excepting that the tubing to be three in number for each pier and 36″ in diameter, piling driven 16′. The superstructure to be 1 Span 129′ in length of the pin bow style, roadway 14, steel joists, 3″ wood floor lattice railing.

Cost—$3,720.00 [142]

Bridge No. 3 (V–1) over Little Colorada near St. Joseph.

6 Spans of 84′ 4″ each resting upon piers consisting of 2 steel tubes, 48″ in diameter with piles driven within in sufficient number and to the required depth to sustain the load to be imposed, tubes to be filled with a rich concrete mixture; superimposed upon these tubes to be reinforced concrete pier to the specified height. The superstructure to a pin connected steel pong trusses as designed in the proposal, 14′ roadway, steel joists, 3″ wood floor, lattice railing,

Cost—$14,775.00.

Bridge No. 4 (T–1) over La Roux Fork west of Holbrook.

2–80′ spans resting upon piers identical with those designated for Bridge V–1. The superstructure to be of the pin connected type as designated in the proposal, 14′ roadway steel joists, 3″ wood floor, lattice railing,

Cost—$3,619.00.

Bridge No. 5 (&–2) over La Roux Fork north of Holbrook. The design of this bridge and piers to be identical with that designated for Bridge No. 4, (T–1).

Cost—$3,919.00.

Bridge No. 6 (&–3) Cottonwood on Keam's Canon Road.

1 Span of 80′ resting on piers of solid concrete superimposed upon piling. The superstructure to be a pin connected truss, 14′ roadway, steel joists, 3″ wood floor, lattice railing,

Cost—$2,600.00.

Bridge No. 7 (A–2) Cottonwood near Snowflake.

2 Spans of 130′ each resting on piers consisting of H steel piling driven to an extreme depth and extending to the height of the shoe of the superstructure. The supersurface portion to be inclosed within a block of reinforced concrete carried down below the scour of the stream. On account of different subsurface conditions at this point a radically different style of substructure has been adopted. The water-way of 160′ at this bridge is 100′ wider

than that of the original estimate made by this office in 1915.

The superstructure to be two pin connected steel trusses, 14′ roadway, steel joists, 3″ wood floor, lattice railing,

Cost—$8,230.00.

Bridge No. 8 (N. I.) over Silver Creek near Snowflake.

It was intended and agreed that this bridge should be reconstructed out of material now on hand, but owing to changed conditions it is deemed advisable to award the work of erecting this bridge in addition to the other contracts, using 2 steel spans, 1 of 77′ and one of 52′ now on hand consisting of [143] new and intact member, resting upon piers to be constructed in the style and manner as those designated for the preceding bridge—No 7.

Cost—$———Minimum.

Bridge No. 9 (C–2) over Colorado south of Woodruff.

This is a short span and little work is involved, as the material is on hand and agreement has been made to erect this bridge by local labor.

Cost—″———Minimum.

The original estimate of this office for the construction of these 9 bridges was $63,000.00. Considering the unprecedented advance in the prices of structural steel since that estimate was made, it is gratifying to find that the sum is still adequate. Furthermore, an investigation has been made by this office relative to the supply of steel available in different localities of the United States, and

the consequent ability of bridge contractors to furnish, erect and complete within a reasonable time the work under contemplation. With no intention of desporagement of other bidders, it is found that bidder No. 7 stands well toward the head of the list in this particular; it not only being a reliable contractor but a constructor of bridges within its own shops. It is, as well, fully able to guarantee its design to meet the standard requirements usual for this kind of work, and this guarantee should be incorporated in all contracts. Copper's General Specifications for Highway Bridges have been adopted as this standard and should be named as a guide for construction. In the course of investigation the fact developed that the bidder named was equipped and capable to prosecute and complete all of the work within a minimum time limit.

The items of major importance in all bridges are foundations and these must be such as will be stable and safe under all conditions which may arise.

In the general preliminary specifications which issued from this office, an advisory plan for piers was given, and although this plan has since then received the commendation of several reputable engineers, it is recommended that it be left optional with the County Engineer to substitute by agreement where desirable concrete filled large steel tubes for the subsurface portion of these piers in place of the solid block of concrete specified. This in no way will change the original plan for the subsurface portion nor be detrimental. Tubes in all cases

will be of sufficient area to receive piling adequate to sustain the load to be imposed, viz.: not more than 15 tons upon each pile.

In the final summary it will be seen that with reasonable care, excellent bridges, as adopted, can be constructed, inclusive of the approaches in all the 9 locations stipulated for or within the amount of the original estimate—$63,000.00.

As this office has used all diligence, care and has had consultation in ascertaining and weighing the facts and figures presented, it is presumed that the Honorable Board will not desire an exhaustive explanation of these, as they are such that can be and are set forth in a graphic form on the accompanying tabulation sheet.

Owing to the fact that the utmost deliberation has been [144] taken since the inception, adoption and receipt of the bridge bond funds, and that the season has advanced to the most desirable time to commence construction work, it seems imperative that these contracts should be awarded and the work be put under way immediately. The pressure of public opinion seems to be in favor of this.

Respectfully submitted,
CHARLES E. PERKINS,
County Engineer.

[Endorsed]: Bill of Exceptions. Filed Sept. 30, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [145]

In the District Court of the United States, District of Arizona.

No. L–56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS.

Comes now Louis F. Mesmer, doing business under the name and style of Mesmer & Rice, by his attorney, George J. Stoneman, and to the bill of exceptions heretofore on the 29th day of September, 1924, presented for approval, a copy of said bill of exceptions having been served upon the attorney for plaintiff on October 2, 1924, makes and files this his proposed amendments to the said bill of exceptions as follows, to wit:

PROPOSED AMENDMENT No. 1.

On page 45 of said bill of exceptions that the following statement be eliminated:

> "Which motion was, by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plaintiff for the sum of Thirteen Thousand Eight Hundred and Seventy-

two 65/100 Dollars ($13,872.65) denied, to which ruling, under and by virtue of this objection to said judgment the defendant duly excepted."

for the reason that it appears that the motion referred to was not made during the progress of the trial of said case or at the close of the taking of testimony and for the further reason that it does not appear that any ruling made by the Court upon the said motion was excepted to or that an exception thereto has been allowed. [146]

PROPOSED AMENDMENT No. 2.

That in lieu of said language as above set forth, or in the event your Honor shall not strike said portion of said proposed bill of exceptions, there be inserted immediately following said language on page 45 of the bill of exceptions the following statement:

"After both sides in response to request heretofore made by the Court had announced that they had no further testimony to offer and the Court having thereafter for the benefit of respective counsel announced its views upon the weight of the evidence and the construction of the contract sued upon, and having requested counsel for both sides to submit briefs both upon the law and upon the evidence and neither plaintiff nor defendant having requested special findings either of fact or of law, and having on the 8th day of July, 1924, directed the Clerk to enter the judgment of the Court in favor of plaintiff for the sum of Thirteen Thousand Eight Hundred Seventy-two and 65/100 Dollars

Dollars ($13,872.65) and judgment having been by the Clerk on said date so entered, defendant was by the Court permitted an exception to the entry of said judgment."

PROPOSED AMENDMENT No. 3.

On page 45 of said bill of exceptions in lieu of the words:

"the extension or allowance of seven to five days."

the following words shall be used:

"the extension or allowance of seventy-five days."

PROPOSED AMENDMENT No. 4.

On page 8 of the said bill of exceptions after the words

"and asked to be read and considered as a part hereof."

that the following excerpt from the transcript of evidence as shown upon page 80 thereof be inserted:

"Mr. STONEMAN.—Your Honor has read the letter?

The COURT.—Yes, sir. Was that marked for identification?

The CLERK.—Yes, No. 6.

The COURT.—It is now 6 in evidence." [147]

PROPOSED AMENDMENT No. 5.

On page 19 of the said bill of exceptions after the words:

"That it was incompetent for the purpose offered or for any purpose."

insert the following: excerpt from the transcript of evidence as shown upon pages 204 and 205 thereof:

"The COURT.—No, but it may be leading up to a question that is.

Mr. CLARK.—Nevertheless, your Honor, we do not think it ought to go in, for the reason stated. It is incompetent for the purpose offered or any purpose.

The COURT.—Q. This was the engineer in charge of the work for the company, you say?

A. This was an engineer—He was county engineer and the county board referred these plans and specifications to him.

The COURT.—The objection is overruled.

Mr. CLARK.—We will note an exception.

Mr. STONEMAN.—Q. Now, then, was there any discussion as to the reasons why the changes contemplated should not be paid for and included in the lump sum of $23,800.00 that you said you would construct the bridge for under the original plans and specifications?

Mr. CLARK.—We make the same objection, your Honor. That is an executive matter that could only be settled by the Board.

The COURT.—Yes, but it is merely a discussion. The objection is overruled. You may have an exception.

Mr. CLARK.—Yes, we will take an exception.

A. The original plans provided, for instance, that the end cylinders would be thirty-three

inches in diameter and have two piles in each cylinder and filled with concrete twenty-one feet long. The alteration, for instance, in the end cylinders substituted for a thirty-three inch cylinder a seventy-two inch cylinder, one that was thirty feet long instead of twenty-one feet long, one filled with seven piles driven to a fifteen ton refusal and piling requiring thirty foot of length as against the original one which only required two piles. Understand, in the original plan, two piles and they were increased to seven. Originally, the cylinder was twenty-one feet long and the new cylinder was thirty feet long. The diameter of the original cylinder was two foot nine inches and the diameter of the final cylinder was seventy-two inches, a very material difference."

PROPOSED AMENDMENT No. 6.

On page 26 of the said bill of exceptions after the words:

"what happened before the Board of Supervisors on December 3, 1917."

insert the following excerpt from the transcript of evidence as [148] shown upon pages 250, 251, 252 and 253 thereof:

"Mr. STONEMAN.—Q. What did you argue about? Can you say all that happened all day long in two sentences? Start in at the beginning and tell what happened and what was done and what the subject of it was and, as near as you can, what was said between you and the Supervisors?

A. Well, we argued over the question of the extras involved by reason of the changes covered by Perkins, by Mr. Merritt's request and by the Engineer's request—the representative of the county on the job. The county absolutely refused to consent in any way to making us an allowance by reason of any of the changes made in the plans at the request of Mr. Perkins embodying Mr. Nichols' recommendations. They agreed to pay for the extras involved on the job by reason of the inspector, this $195.00 item; they agreed to pay for the changes involved in the plans by reason of the incorporation of Merritt's request—

Mr. CLARK.—I would like to have the conversation stated as nearly as we can.

The COURT.—Yes, if you can remember the conversation.

A. Your Honor, there were three supervisors present and we had a kind of a round robbin there. We talked all day over this thing and I am just trying to sum up into a kind of a conclusion as to what was said after the whole day's argument.

Mr. STONEMAN.—Q. Now, what was the subject of the argument? A. Extras.

Q. The demand that you had previously put in in November? A. Yes, it was the extras that were involved—I had extra in our November demand and this—November 5—I will repeat it again. This November demand, they finally said, 'We will allow this—we will allow

the expense incurred by reason of the changes made at the request of our inspector, first. Second, we will allow the changes in the plan as made at the request of Merritt. Third, we will not allow anything on the changes made in the plan as embodying Perkins' recommendations and Nichols' report as carried out.' Well, we quit at 5:00 o'clock and I went over from there to Perkins' house.

Q. And, in the meantime, you had not received any money out of the November demand? A. No, sir, they would not give me any money and, in order not to disturb my equities, I refused to go on that basis. I then went over to Perkins' house with Mr. Popert and I saw there some of the original calculations involving the extras involved by reason of these changes carried out by the unit prices as per *addenda;* I saw Merritt's letter covering these —requesting these changes and I saw the rough parts of the paragraph covering the substructure and I then went over to Mr. Larson's house and we had—with Mr. Popert and talked with him a little bit and I asked him if there was not some kind of a way of getting out of this thing—I was in desperate straits—and he thought probably there was and, at his suggestion, we came back—we decided to go back and have another round robbin in the evening after the Board convened and we talked again. I told the Board that I would not accept any demand on [149] Merritt's alterations but I

would accept the pay for the balance due to make—to complete the original plans and I would accept the additions involved by reason of the inspector on the job. The Board drew up a warrant which was finally on that basis and I left in a huff and went to the station and said, 'I am through. I can't do business—'

Q. You say it was final?

A. I will give you the—

Q. Give you 11 and 12?

A. 11 or 12, one of those.

Q. I hand the witness Plaintiff's Exhibits 11 and 12.

A. The county drew up the Exhibit 12 and I refused to sign this, because it was—stated for full payment of contract of Winslow Colorado Bridge and I left in a huff and went to the station. When I was there, Mr. Popert says, 'Here, I represent the American Bridge Co. We have got to have some money. I am going back there as a representative of the American Bridge Co. and see if we can't reach some compromise with the Supervisors,' so he went back and had a talk and about on hour or half an hour afterwards, he came back and he says, 'Now, be reasonable, Mesmer. Come on over there and we will talk this thing again,' so I went back again and, after considerable argument, in which Mr. Freeman said he was perfectly willing to give me a thousand dollars for my extra foundation but that is about as

far as he would go and which I said I could not accept, we finally drafted this No. 11—Exhibit 11, wherein it specifically stated just what the $6,204.62 covered. It specifically left out Merritt's alterations.

Mr. CLARK.—Isn't that matter appearing on the face of the demand and it doesn't need any elaboration by the witness? It speaks for itself.

The COURT.—It probably does but he has already testified to it.

A. The reason that I insisted on leaving out Merritt's alterations, over which there was no controversy and never was any controversy, because that I did not want to embarrass myself by putting the claim with the county—which the county contended was not relevant, in with the claim that they had admitted to be correct. They signed the draft as drawn up and the warrant was drawn for the amount. Before, however, the warrant was drawn, Mr. Larson, District Attorney, drew up a formal release, in which I agreed to save the county harmless for all liens of labor or any kind of bills that might be incurred and he turned around to Mr. Popert and asked him if he was satisfied he could get his money out of me; that he owed me the money; and when he told him he thought he would take a chance, they drew a warrant and signed it and I left."

PROPOSED AMENDMENT No. 7.

On page 28 of the said bill of exceptions after the words "Yes, sir," insert the following excerpt from the transcript of [150] evidence as shown upon pages 258 and 259 thereof:

"Q. What did you say and who did you say it to?

A. Told the whole Board that I reserved the right to sue for the extras involved by reason of the changes in the plans covered by Merritt's extras or the Indian Department extras and the changes in the plans by reason of the incorporation of Perkins' requests.

Q. Do you know whether at that time there was any reference to the extras as being included in the November 5 claim?

A. State that question again.

(Question read.)

Q. Those extras that you reserved the right to sue for.

A. They were all included in the November 5 claim.

Q. Did the Board understand—Did you say anything to the Board identifying the extras that you claimed the right to sue for as being the extras included in the November 5 demand?

A. That was what we were talking about all of the time, the extras involved in the November 5 claim, yes, sir. The extras of the No-

vember 5 claim was the only subject of dispute or ever was in dispute.

The COURT.—Q. That is all that you are suing for? A. Yes, sir."

PROPOSED AMENDMENT No. 8.

On page 42 of the said bill of exceptions after the words:

"OMITTING several questions said witness testified as follows."

the following excerpt from the transcript of evidence as shown upon pages 507, 508 and 509 thereof:

"Q. Did you ever make any attempt to figure the weight of the excess material either in steel or cement?

(No answer.)

Q. Did you? A. Sir?

Q. Did you ever make any attempt—Did it concern you at all as to the cost of the contract of all this extra material?

A. Why, yes, we got all of the information we could from our engineer.

Q. Did you read the letter that had been sent to you by Perry F. Borchers, Assistant Commissioner of Indian Affairs?

A. I guess I did.

Q. With reference to that bridge?

Mr. CLARK.—If the Court please, I don't think the record will show that any letter was sent by Borchers to the Board of Supervisors.

Mr. STONEMAN.—No, I said sent to him.

I did not say Board of Supervisors—sent to Mr. Creswell personally, my question is.

The COURT.—Yes, that is a fact.

Mr. STONEMAN.—Q. You read that, did you? A. Yes.

Q. Did you read in that letter that Mr. Borchers had said that the $23,800.00 appropriated by the county and $15,000.00 more—that with the $28,600.00 of the bond issue appropriated by the county for the building of [151] the T-3 bridge over the Little Colorado, together with the $15,000.00 of the Government there would be $43,000.00 which he thought would be amply sufficient to pay for the increased cost? Did you read that in Borcher's letter or words to that effect?

A. Yes, I read that in the letter.

Q. Didn't that suggest to you, if nothing else, that the changes required by the Indian Department would necessitate a greater cost in material, labor and steel structure?

A. Well, that extra expense did not all go to Mesmer & Rice. We put on another steel span there by another company and built the bridges.

Q. That had nothing to do with it at that time, did it? A. No, sir.

Q. This $15,000.00 could only be used on the Little Colorado bridge, couldn't it?

A. It was used on the bridge.

Q. What are you talking about? You could

not have used this $15,000.00 on another bridge if you had wanted to?

Mr. CLARK.—We think counsel is unfair with the witness. The witness says that $15,000.00 was used on the bridge but it was used in building an extra span.

The COURT.—Yes, extra span on the same bridge.

Mr. CLARK.—Yes, and not in the contract with Mesmer & Rice at all.

Mr. STONEMAN.—Q. In other words, up to the time that you settled, as you claim, with Mesmer, then you still had that $15,000.00 in your pockets, didn't you?

A. No, we did not have it in our pockets.

Q. You had it in the County Treasurer's Office? A. Yes.

Q. And had not spent a cent of it, had you?

Mr. CLARK.—If the Court please, that is wholly—

Mr. STONEMAN.—Q. Never used it for the payment of the construction of some work?

The COURT.—It has been answered.

Mr. CLARK.—Well, we move to strike it then.

The COURT.—It may stand. The motion is denied."

Dated: This 11th day of October, 1924.

Respectfully submitted,

GEORGE J. STONEMAN,

Attorney for Complainant.

[Endorsed]: Proposed Amendments to Bill of Exceptions. Filed Oct. 13, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [152]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Thursday, October 16, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 16, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 25, 1924, TO SETTLE BILL OF EXCEPTIONS.

It is ordered by the Court that time within which to settle defendant's bill of exceptions herein is hereby extended to and including Saturday, October 25th, 1924, owing to stress of court business, the Court having been unable to settle said bill of exceptions within the time heretofore allowed. [153]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, October 17th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 17, 1924—ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 27, 1924, TO SETTLE BILL OF EXCEPTIONS.

It is ordered by the Court that time to settle bill of exceptions herein is further extended to and including the 27th day of October, 1924, owing to stress of court business, the Court being unable to settle the bill of exceptions within the time heretofore allowed. [154]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Friday, October 17th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 17, 1924—ORDER RE PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS.

The defendant having filed proposed amendments to its bill of exceptions herein,—

IT IS ORDERED as follows:

First proposed amendment is disallowed.

Second proposed amendment is allowed.

Third proposed amendment is withdrawn.

Fourth, fifth, sixth, seventh and eighth proposed amendments are allowed.

IT IS FURTHER ORDERED that there be added to the eighth proposed amendment that portion of the Reporter's transcript beginning with line 6 of page 510 to and including line 18. [155]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Saturday, October 25th, 1924.)

No. L–56 (PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—OCTOBER 25, 1924—ORDER PERMITTING TEMPORARY WITHDRAWAL OF BILL OF EXCEPTIONS FROM FILES.

It is ordered by the Court that the defendant be allowed to withdraw temporarily from the files of the Clerk the proposed bill of exceptions for the purpose of incorporating amendments therein, as heretofore allowed. [156]

In the District Court of the United States, District of Arizona.

No. 56 PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Navajo County, by its attorneys, and respectfully represents that this action is brought by the plaintiff to recover of the defendant a balance alleged to be due of Thirteen Thousand Eight Hundred and Seventy-two Dollars and Sixty-five cents ($13,872.65), for extras in the construction of a certain bridge across the Little Colorado River near Winslow, Arizona.

That on the 17th day of March, 1924, said cause came on for trial before the above-entitled court, sitting without a jury, and thereafter on the 8th day of July, 1924, said Court rendered judgment in favor of said plaintiff and against your petitioner, the said defendant, for the sum of Thirteen Thousand Eight Hundred and Seventy-two Dollars and Sixty-five cents, ($13,872.65), and for costs of suit

taxed at the sum of One Hundred and Fifty-two Dollars and Ten cents ($152.10).

And your petitioner feeling it is aggrieved by said judgment therein entered, as aforesaid, respectfully [157] petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the 9th Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue herein to the United States Circuit Court of Appeals aforesaid, sitting at the City of San Francisco, in the State of California, in said Circuit, for the correction of errors complained of and herewith assigned, and that an order be made fixing the amount of security to be given by this defendant as plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the said Circuit Court of Appeals, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

THORWALD LARSON,
Co. Atty.
E. S. CLARK,
NEIL C. CLARK,
Attorneys for Defendant, Petitioner for said Writ.

[Endorsed]: Petition for Writ of Error. Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [158]

In the District Court of the United States, District of Arizona.

No. 56–PRESCOTT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the above-named defendant, Navajo County, by its attorneys, and files the following assignment of errors, upon which it will rely upon its prosecution of a writ of error in the above-entitled cause from the judgment rendered herein on the 8th day of July, 1924.

Said defendant says that in the record and proceedings herein in the United States District Court, for the District of Arizona, there is manifest error, to the great prejudice of the defendant, in this, to wit:

1. That the United States District Court for the District of Arizona erred in overruling defendant's objection to the introduction of plaintiff's Exhibit

No. 1, being the call for bids of Navajo County for the construction of certain bridges, upon the ground that it was immaterial, it appearing that long after that call was made a contract was signed with full specifications and that a mere proposal for bids would have no bearing whatsoever on that contract one way or the other, no matter what it might be. [159]

2. That said District Court erred in overruling defendant's objection to what purported to be a copy of an original report addressed to the Supervisors of Navajo County, and purported to be signed by Chas. E. Perkins, County Engineer, and introduced as plaintiff's Exhibit 4, for the reason that it was a copy. That no foundation had been laid for the introduction of secondary evidence. That it bore neither date or signature or was it in anywise identified as an official report. That it was irrelevant, incompetent and immaterial. That it imported no verity or authenticity. That although purported to have been made by the County Engineer, he was not authorized to speak for, or bind, the Board of Supervisors in any way at that time.

A copy of said exhibit is hereto attached and marked Plaintiff's Exhibit 4.

3. That the said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to Wallace Ellsworth, the Clerk of the Board of Supervisors of Navajo County, called as a witness for the plaintiff:

"Mr. STONEMAN.—Uuder what date of the meeting of the Board of Supervisors is that minute entry made?

A. Under date of August 7, 1916.

Q. Read that into the record.

Mr. CLARK.—Now, if the Court please, we shall object to that on the ground that it is irrelevant, incompetent, and immaterial and that on its face it was a minute of the Board of Supervisors made prior to the execution of the contract between the plaintiff and defendant here and that different conditions may have been talked of or discussed or placed of [160] record prior to that time having no bearing on the contract itself and are no part of it and, therefore, ought not be admitted in evidence unless shown in the contract itself.

The COURT.—What does it purport to be?

Mr. STONEMAN.—The purport of it is that the bid of Mesmer and Rice, being the best bid, is accepted and approved subject to the approval of the contract, specifications and plans by the United States Indian Department.

Mr. CLARK.—We think your Honor can see that it is immaterial. The contract or the bid must have been accepted or there would have been no contract and, if the latter part of this, which refers to the Indian Department, is in the contract itself, which it is not, then this might shed some light on it but, inasmuch, as it is not and everything pertaining to the Indian Department was carefully stricken from the

contract before signing, we say this can have no bearing.

The COURT.—Don't you put them upon proof by the allegations of your answer as to the very subject of the execution of this contract?

Mr. CLARK.—Not as to anything prior to the date of the contract itself and we confine our answer to that. There are certain allegations in the complaint as to what transpired afterwards, which, of course, are material and we have denied those in so far as we have seen proper. In any event, he would not be put to proof of any immaterial matter.

The COURT.—No. The objection is overruled.

To which ruling counsel for defendant then and there excepted and the witness read the record in question as follows:

'A. The bid of Mesmer & Rice of Los Angeles, California, being lowest and best bid received for the construction of bridge across the Little Colorado River near Winslow at a cost of $23,800.00, the same is accepted and approved subject to approval of contract, specifications, and plans therefor by United States Indian Department, which department expects to pay one-half of the cost of construction of same bridge.''

4. That the said United States District Court erred in overruling defendant's objection to the cross-examination by counsel for plaintiff of R. C.

Creswell, formerly a member of the Board of Supervisors of Navajo County, and called originally by plaintiff for the purpose of cross-examination under paragraph 1680, R. S. A., 1913, [161] which paragraph reads as follows:

> "A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination, at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony. Such witness when so called may be examined by his own counsel, but only as to the matters testified to on such examination."

for the reason that said witness was not then a supervisor, that he was in no official position of any kind or character and that anything he might testify to at that time should proceed under the usual rule as plaintiff's witness without the right of cross-examination; that when the official relation has ceased one who has been an officer may be made a witness only as other witnesses. That the witness was then a private citizen not bound by official sanction.

Whereupon, the following colloquy occurred:

"The COURT.—Well, the rules of evidence in the state courts do not apply in the Federal court.

Mr. STONEMAN.—No, I know that.

The COURT.—Q. During all of these proceedings, Mr. Creswell, were you a member of the Board?

A. Yes, sir. That is, during the time the contract was being let and settled up.

The COURT.—You are offering him for cross-examination?

Mr. STONEMAN.—Yes, sir. I don't want necessarily to be bound. I don't know what he is going to say. I never talked to him, being an adverse witness.

The COURT.—You are merely going to examine him as to this contract and his participation in it?

Mr. STONEMAN.—Yes, sir. [162]

The COURT.—Well, the objection will be overruled. However, you will be limited to that contract and matters that occurred before he retired from the Board.

Mr. STONEMAN.—Yes, sir.

To which ruling counsel for the defendant then and there excepted.

THEREUPON said witness testified among other things, as follows:

'Mr. STONEMAN.—Q. Mr. Creswell do you remember receiving during the month of September or perhaps October, 1916, a letter ad-

dressed to you as chairman of the Board of Supervisors by E. B. Merritt, Assistant Commissioner of Indian Affairs? A. Yes, sir.

Q. Would you recognize a copy of the letters, if you saw it? I hand you what we think is a copy of the letter and ask you if you received the original?

A. Yes, sir. I think I received the original of that, if I remember.

Q. Do you know where the original is, Mr. Creswell? A. No, sir, I do not.

Q. You left, I suppose, with the Board of Supervisors?

A. Well, I either left it there or a copy there. This was sent direct to me at Winslow.

Q. Did you communicate the contents of that letter when it was received by you to the Board of Supervisors? A. Yes, sir.

Mr. STONEMAN.—We offer this in evidence now and ask that it be marked Plaintiff's Exhibit 6.

Mr. CLARK.—That has been marked plaintiff's exhibit already.

Mr. STONEMAN.—That has been marked plaintiff's exhibit for identification.

Mr. CLARK.—We object to it on the ground that it is immaterial and hearsay.

The COURT.—Q. How did you get it—through the mail? Did it come to you through the mail? A. Yes, sir.

Mr. CLARK.—Please add to that objection that it is incompetent. [163]

The COURT.—Objection is overruled.

To which ruling of the Court the defendant then and there excepted.'

THEREUPON said purported letter was admitted in evidence as Plaintiff's Exhibit No. 6, and is hereto attached as such exhibit duly numbered for identification.

WHEREUPON said witness further testified as follows:

'Mr. STONEMAN.—Q. I hand you what purports to be a copy of a communication dated at Holbrook, August 9, 1916, addressed to the Board of Supervisors of Navajo County, purporting to be signed by Thomas F. Nichols for the State Engineer, and ask you if you ever say the—ask you to examine this copy and state whether or not you ever saw the original of it?

A. It has been so long that I don't know whether I could recall the exact wording but he made such report I know. (Witness reads document.) As far as I know, I think it is a copy of the report from Mr. Nichols, State Engineer.

Mr. STONEMAN.—We offer this copy to which the witness has just testified and ask that it be marked as a plaintiff's exhibit with the appropriate designation.'

(Counsel for plaintiff asked counsel for defendant if they had the original of this report, and were informed that they did not.)

The copy to which the witness had just testified was then offered in evidence, to which offer counsel for defendant objected on the ground

that on its face it was a report made prior to the filing of the contract. That all prior matters were deemed to be incorporated in it. That it was immaterial, irrelevant and incompetent; that it is hearsay as it stands, without authenticity. Which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON said copy was admitted in evidence as Plaintiff's Exhibit 13, a copy of which exhibit duly numbered for identification is hereto attached and asked [164] to be read and considered as a part hereof.

THEREUPON the plaintiff offered in evidence further testimony on the part of said witness as follows:

'Mr. STONEMAN.—Q. When did you see the demand that I filed on behalf of Mesmer and Rice with reference to the time that some kind of a meeting, legal or otherwise, was held by the Board of Supervisors on or about the 23d day of May, 1918?

A. Well, I don't remember those dates at all.

Q. You remember the meeting being held, don't you?

A. I remember hearing them talk about it, yes, but I say, I don't remember being at that meeting.

Q. Who talked to you about it?

A. I think Mr. Owens did.

Q. What did Mr. Owens say?

To which question the counsel for defendant

then and there objected on the ground that it was hearsay and immaterial. His objection was by the Court sustained.'

THEREUPON the following question was propounded by counsel for plaintiff.

Q. How did Mr. Owens or Mr. Freeman happen to speak to you at all about it, do you know?

To which question counsel for defendant made the objection that it was immaterial and that it called for a conclusion. Which objection was by the Court overruled. To which ruling, defendant then and there excepted and the witness thereupon testified as follows:

'A. Well, as I remember, Mr. Owens remarked that Mr. Stoneman was over there and wanted to reopen that case of Mesmer & Rice, and they could not see any necessity of reopening it. They said they had paid them in full.

Q. How did you first acquire any information as to whatever was done at this meeting?

To which question counsel for defendant objected on the ground that it was immaterial.

WHEREUPON the following colloquy ensued: [165]

'The COURT.—He might have acquired the information from the record.

Mr. CLARK.—Then it would be more objectionable. It would be pure hearsay if he received it from a record. The record would be the evidence.

The COURT.—Do you contend that the Board of Supervisors or any other board or

public body may hold a special meeting and solemnly transact business that affects the rights of individuals and fail to record it and preclude the party from proving it after they have acted upon it.

Mr. CLARK.—No, sir, and we say that nothing of this kind has been done by this Board at any time. We will make this suggestion. First, that this meeting was not a meeting of the Board of Supervisors as such. It was called as a mere conference at Mr. Stoneman's request and the telegram upon which it was based was dated the 19th day of May, 1923, and this meeting was held at his request on the 23d, only four days between the date of the telegram and the date of this meeting. Now at this meeting, your Honor, the Board of Supervisors could not legally have taken any action upon any claim to the prejudice of this plaintiff. The statutes require that every claim be presented at a regular meeting, not a special meeting. A special meeting may not be held for the purpose of considering a claim and we think counsel is aware of that and, if no action was taken at that meeting, it was because among other things, that the claim was presented to the Board for the first time then and at a special meeting, at which they could not legally consider it. Now, I am not saying what counsel may have understood. I am stating the situation as it is your Honor, and we are within our rights in objecting to all of this testimony.

We haven't a scrap of paper nor a word of testimony as to anything that happened that is not wide open to counsel and I think they too appreciate that. If certain things are gone, they are gone from us as well as from him.'

Which objection was by the Court overruled.

To which ruling defendant then and there excepted and the witness was then permitted to testify as follows:

A. Well, just as I stated, I think Mr. Owens told me he had been over there—that Mr. Stoneman had been over there to Holbrook and talked with him and Mr. Freeman over this claim of Mesmer & Rice.

The COURT.—Mr. Creswell, you called that special meeting, did you not?

A. I sent that telegram that I got from Mr. Stoneman to the Clerk and asked him to 'phone the other two members.

Q. Yes, and they were all present?

A. The other two were present, but I can't recall to my mind that I was there. [166]

Q. You say you were not there?

A. I don't think I was there, Judge.

Q. Do you know that you were not there?

A. No, I was not there."

5. That said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to C. E. Owens, a member of the Board of Supervisors of Navajo County, who had been called originally by

plaintiff for cross-examination under paragraph 1680, R. S. A., to wit:

"Mr. STONEMAN.—Q. That was the meeting at which the warrant for $6,204.00 was paid?

A. Well, I don't remember as to the date. I remember that meeting, yes.

Q. Now, the $6,204.00 was a part of the amount that has been claimed by Mesmer & Rice before December 3, wasn't it?"

upon the ground that the question called for a conclusion of the witness and that the transaction must speak for itself from the record as made.

"THEREUPON said witness was permitted to testify as follows:

A. This $6,204.62 was the final payment that was due, according to our understanding on the contract on that bridge and this was the demand that we approved and paid.

Q. Now, prior to that time, this demand of November 5, had been presented, hadn't it, and you rejected it? A. Yes, sir.

Q. I am handing the witness Plaintiff's Exhibit 10.

(Being the demand filed by plaintiff against the defendant county on November 5, 1917.)

Now, isn't it true, Mr. Owens, that the $6,204.65 that was finally paid to Mr. Mesmer on December 3, 1917, was intended to—by the Board of Supervisors to be a compromise and a settlement of [167] all the money that had

been demanded by Mesmer & Rice in November or at any previous time?

A. No, sir, I do not understand it that way.

Q. How do you understand it?

A. I understand that $6,204.00 was the last payment due on the contract and the reason that we rejected this thing because there was no evidence there to show us where these things were placed. There is nothing attached to the demand to give us any evidence why we should pay that extra amount."

6. That the said United States District Court erred in overruling defendant's objection to the following question propounded to the said witness C. E. Owens during the cross-examination last above referred to, to wit:

"Q. But you knew that the $6,204.00 which you allowed on December 3 was included in the demand of November 5, didn't you? What was your answer?"

for the reason that it must appear, if it appears at all, from the face of the demands that the statute requires that these demands be itemized, stating minutely what each item is for and assuming that they have followed the law, it will appear from the face of these demands whether the last one on December 3d includes any part of those theretofore presented and objected.

Thereupon counsel for plaintiff changed the form of his question to read as follows:

"Mr. STONEMAN.—Q. Now, didn't that claim of November 5 include the amount of

money which you admitted you owed him, $6,204.62?"

To which question defendant interposed the objection already made, together with the further objection that the question calls for a pure conclusion of the witness.

Thereupon the following colloquy occurred:

"Mr. STONEMAN.—I will change the question, Mr. Clark.

Q. Didn't you so understand on December 3 that that $6,204.62 was included in one or the other—in the demand of November 5?

Mr. CLARK.—That is already objected to. We certainly object to it. An understanding is something so intangible [168] we can't reduce it to this record. It must appear by the face of those demands whether or not the later demand of December 3 was included in any portion of the former, and if the demands were properly made, and I am assuming that they are, they will so show one way or the other.

The COURT.—If this witness knows, why can't he testify to it?

Mr. CLARK.—He asks him to testify to an understanding which understanding must appear from the face of the demands themselves under the legal rule.

The COURT.—Well, the first question was—he asked him if it was not included and it was not part. He changed the question.

Mr. CLARK.—That is the thing that this

Court should determine from an inspection of the demands themselves whether it is or not.

The COURT.—Well, I may not be able to determine.

Mr. CLARK.—Then this witness surely, we claim, would not have the right, if the demands were put in such shape that this Court could not determine it—we ought not to be bound by the fallacious conclusion, as we think it would be, of any witness.

Mr. STONEMAN.—May it please your Honor, I withdraw that question and ask him questions with regard to the claim of October 1.

Q. The amount of $6,204.00 which you paid to Mr. Mesmer on December 3, 1917, was included in the demand of October 1 or, in this case, Plaintiff's Exhibit 9, was it not?

Mr. CLARK.—That is the same question in slightly different form and we object to it upon the same grounds."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted, and the witness was permitted to answer as follows:

"A. Well, whether that part of it was included in that or not, I can't say at the present time but these demands were fixed up in such a way that we as Board of Supervisors did not feel like we have a right to honor them and therefore, we reject them as they was in the whole amount.

Mr. STONEMAN.—Q. Why did you reject

the demand of October 1 with the items of the different amounts claimed?

Mr. CLARK.—Well, now, we object to that.

Mr. STONEMAN.—In what respects does not—did it warrant the action of the Board of Supervisors?

Mr. CLARK.—The witness has answered that question once. [169]

The COURT.—He has asked as to November 5 but he has not as to October 1.

Mr. STONEMAN.—That claim of October 1, as your Honor will recall, was deferred—the action on it was deferred until November.

Mr. CLARK.—Yes, that is the record. Now, in the first place, in support of our objection, we say that the witness no supervisor is bound to give a reason for the rejection of a claim; that their reason ought to appear from the claim itself and we say that it does appear plainly on the face of this demand.

The COURT.—I don't know of any rule that would preclude him from giving his reasons. If he knows why the Board acted in the way in which it did, I think he has a right to testify. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Our reasons for rejecting this demand is the same as the other. There is nothing there to satisfy the Board as to the evidence of these things that were passed on there. There

isn't an O. K. there of the inspector or nothing attached to that bill where they incurred that extra expense and we could not honor a demand like that."

7. The said United States District Court erred in overruling defendant's objection to the following question propounded to the said witness, C. E. Owens, in the course of the cross-examination last above referred to:

"Mr. STONEMAN.—Well, you refer only to the extra expense. How about the structural steel, 147 tons at $120.00 a ton, amounting to $17,640.00? What is the objection to that?"

(The item referred to in the demand of Oct. 1, 1917 (Plaintiff's Exhibit 9) is not charged for therein as an extra but as material delivered as per original contract.)

for the reason that if there were any informality or defect in the demand it was not the fault of defendant. That if a certain number of tons of steel were charged for in that demand, before the Board could pay it there would have to be a showing by some agency or direction of the County Engineer, showing how much steel would have been required under the contract or under the proposal, so that if [170] plaintiff had furnished more that would show why demand was made for so many tons of steel.

The witness was thereupon permitted to testify as follows:

"A. Because the demand was not itemized sufficiently and it claimed more money on there

than they were entitled to and we demand an itemized demand."

8. The said United States District Court erred in refusing to strike from the record Plaintiff's Exhibit No. 17, being a purported demand presented by the plaintiff to the Board of Supervisors or to certain members of the Board on the 23d day of May, 1918, on the ground that the alleged statement or demand is not itemized as required by the statutes of Arizona. Secondly, that at the time it was presented there was no indebtedness of any kind or character on the part of Navajo County to this plaintiff. Third, that this claim is not sued upon or mentioned in any way in the complaint as will appear by reference to page 10 of the amended complaint wherein it is stated that the demand of this plaintiff was presented on or about the 3d day of December, 1917. That there is no showing in the complaint that this demand was ever presented or filed within six months from the time the alleged claim, or any item in it, arose. Lastly, that it is irrelevant, incompetent and immaterial.

The introduction of said exhibit was thereupon allowed to stand and a copy of same is hereto attached, properly marked as Plaintiff's Exhibit 17.

9. The said United States District Court erred in overruling defendant's objection to the following question propounded to R. S. Teeple, witness called in behalf of plaintiff, to wit:

"Mr. STONEMAN.—Q. Do you remember seeing a demand presented by Mesmer and Rice on May 17, for $17,856.00 upon which that war-

rant was paid and shown by what purports to [171] a carbon copy of a demand, which I hand you?

The COURT.—Is that 1917?

A. Yes, sir. I believe I recollect this, Mr. Stoneman. I can't say as to those figures.

Q. Now, wasn't it upon this demand that that warrant of $10,000 was issued?

A. That is my recollection, although a new demand might have been made out.

Q. You recollect that it was this. We offer this in evidence upon the identification of it by this witness and ask that it be marked a separate exhibit."

for the reason that it as irrelevant, and incompetent and that the complaint is not based either wholly or in part upon any demand of May 17, 1917.

Thereupon Mr. Stoneman, for plaintiff, made the following explanation:

"Mr. STONEMAN.—It is offered not for the purpose of that—that purpose at all. It is offered for the purpose of showing that the Board of Supervisors has, at least in this instance, made an allowance upon—without a separate demand covering the amount allowed being presented."

Said purported demand was thereupon admitted in evidence properly marked and numbered for identification.

X.

10. That said United States District Court erred in sustaining the motion of plaintiff to strike the

following testimony of the said witness R. S. Teeple, upon defendant's cross-examination of him respecting the demand of plaintiff against Navajo County, dated December 3, 1917:

"A. Now, calling your attention, Mr. Teeple, to the line starting with the word "less" purported to be credits on this demand, opposite which is a total of $17,000.00, as I remember it?

A. Yes, sir. $17,600.00.

Q. $17,600.00 is right. Now I will ask you if that amount does not include all payments of every kind and character theretofore made by the Board of Supervisors to the plaintiff on this bridge?

A. It was so intended. [172]

Q. I am asking you if it does not?

A. It does, yes."

Upon plaintiff's objection to said question on the ground that the witness was not qualified to answer, although it appears in the record that on December 3, 1917, the witness was the Clerk of the Board of Supervisors of Navajo County.

11. The said United States District Court erred in sustaining the motion to strike of plaintiff, certain testimony of the said witness, R. S. Teeple, as to additional work done upon the bridge in question by the County in order to complete it.

Upon the ground that it is contrary to the record made in this case, in that the record shows in this case that the plaintiff claims the payment of $6,204.00 in final acceptance and payment of all demands upon the construction of that bridge, and that it is

incompetent for the purpose of disputing the record that the Supervisors did accept the bridge and finally paid for it. Said testimony being so stricken, was as follows:

> "A. On the east side, a long piling or trestle approach was constructed. On the west end, another steel span and on the west or south bank of the river piling driven in and protection work to keep it from washing, and dirt approaches also on the west end, and perhaps, some dirt on the east end. This extra steel span was built by the Omaha Structural Steel Bridge Co. and it followed the work done by Mesmer & Rice, and that work was necessary to complete the bridge so that it could be used."

12. The said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff, Louis F. Mesmer, while testifying in his own behalf upon direct examination, as to certain conversations alleged to have occurred about August 8, 1916, and prior to the execution of the contract in question which [173] was made on September 5, 1917, said conversation purported to have been made with C. E. Perkins, County Engineer:

> "Mr. STONEMAN.—Now, then, what conversation, if any, led up to the ——— and what reasons were there why the payment for the additional work suggested by the County Engineer should not be included in the $23,800.00? In other words, I mean why was it the provision put in there that the substructure should be

constructed according to the *addenda* rather than that it should come out of the $23,800.00?"

Upon the ground that it involved something that could only be determined by the Board of Supervisors and anything that the County Engineer might have said as to that could not be binding upon the defendant at all. That it was incompetent for purpose offered or for any purpose.

13. That said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff during the same examination last above referred to:

"Mr. STONEMAN.—At that time did Mr. Perkins say anything to you about the possibility of further changes by reason of the requirements that might be made by the representative of the Indian Department?"

Upon the ground that additional quantities required before the contract was made and signed, and particularly before any construction had started were immaterial. That they were not matters coming within what counsel calls *addenda.* For the reason that all of these things to which the witness has just testified as being additional quantities and sizes, are in terms set forth in the contract and that plaintiff was to furnish each one of these things so mentioned and which are mentioned in the report of the County Engineer and in the report of Mr. Nichols. For the further reason that the *addenda* to which counsel has referred contains this provision, which is in the contract as well as in the proposal:

"If, after construction has commenced it appears that additional quantities are required, they [174] shall be paid for as follows": and that the contract itself provides that the *addenda* shall only become effective after construction is commenced, if it be apparent that additional quantities are required.

14. The said United States District Court erred in denying defendant's motion to strike the following testimony:

"Mr. STONEMAN.—Well, what influence did it have and why was the phrase 'as per *addenda* for extras upon proposal accepted' inserted in the contract as finally signed, in so far as the substructure work was concerned?

A. So that any alterations made in the substructure other than—over those that were shown on the original plans would be paid for as per the unit prices shown in the *addenda.*"

On the ground that the answer was a conclusion by way of interpretation of the contract which forestalls the Court in its construction. The contract being clear, plain and unambiguous.

15. That the said United States District Court erred in denying defendant's motion to strike the following testimony:

"Mr. STONEMAN.—Was there any attempt by either of you or Mr. Perkins at that time to reach a figure as to what additional money would be required to construct the bridge according to the suggestions of the County Engineer?

A. Yes, the quantities, the cubic yardage of concrete was figured, the number of extra piles was figured, the amount of reinforcing bars was figured, the amount of structural steel required was figured and all of the various items that go to make up the alterations were estimated and they were added on the contract price of $23,-800.00 and then that amount subtracted from the total amount of $28,000.00—figured 28,-000.00 and some odd plus 15,000.00, to see whether those alterations from the total cost was inside of the available money for the work."

On the ground that said answer was wholly unanticipated, irrelevant, incompetent and immaterial. [175]

16. That the said United States District Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 21, purported to be a plan showing the difference between the plans and specifications upon which the bid was submitted, and the plans and specifications upon which it was agreed the substructure should finally be built. Upon this offer the following question was propounded and the answers following said questions were given:

"Q. Are these the plans that you have testified to as showing the changes in the substructure from the plans of construction of the substructure that was included in your bid?

A. They are. They show the difference be-

tween the two river piers on the original plan as proposed and as built."

The objection was upon the ground that it did not appear from anything the witness had stated that the offered plan is anything more than one prepared by Mr. Popert. That it does not show that the County Engineer had anything to do with it.

Whereupon, the Court made the following observation:

"The COURT.—No, it does not show it was submitted to him or made with his approval or changes were suggested—

Mr. STONEMAN.—It is not offered for that purpose, if your Honor please. It is offered for the purpose of in a little while of forming the basis of the computation of the extra cost under the flat charges of the additional steel and concrete in place required by the changes.

The COURT.—You expect to show that the work was done in accordance with these plans and changes?

Mr. STONEMAN.—Yes, sir."

Thereupon counsel for defendant added to its objection that the offered exhibit would be self-serving and not under the authenticity or approval of the County Engineer or anyone else who might bind the County, and would be in the nature of hearsay as well as incompetent. [176]

Thereupon, notwithstanding said objection, said Exhibit 21 was admitted and the witness was per-

mitted to testify fully regarding the same, and the computations based thereon.

17. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by plaintiff's counsel:

> "Mr. STONEMAN.—In answering the next question, I will ask you, please, always, in each instance, Mr. Mesmer, give the cost first of the construction under your own plan and specifications and then give the added cost as shown by the changes required by the County Engineer, if you can do that."

Upon the ground that in the contract there is a certain substructure definitely and specifically provided to be built by the plaintiff for Navajo County, and that the words in the contract: "substructure to be as follows: as per *addenda* for extras upon the proposal accepted" refer only to extras beyond the substructure that is definitely contracted to be built in the contract, no part of which is designated as an extra. That this provision as to extras has no application except to things added to the contract after actual construction shall have commenced, and that it is immaterial. Notwithstanding said objection, the witness was permitted to testify fully to comparative costs.

18. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

"Mr. STONEMAN.—Q. Well, start in on the morning of that day (December 3, 1917), and tell the Court, as far as may be permitted to tell, what happened, and what was done between you and Mr. Popert and the Board of Supervisors."

On the ground that the plaintiff is precluded by the receipts, which is a final one, and by his undertaking of the [177] indemnity given on that date and by all of the circumstances surrounding this case. That the receipt constitutes, or that demand and the warrant for its payment constitutes a full and final payment of all demands.

Notwithstanding said objection, the witness was permitted to restate fully the version of what happened before the Board of Supervisors on December 3, 1917.

19. The said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff, Louis F. Mesmer, by his counsel:

"Mr. STONEMAN.—Q. Wasn't the matter being discussed between you and the Board of Supervisors, as to whether or not the Board of Supervisors, should pay the whole of the claim as it was included in the demand of November 5, or whether they should pay part of it, or whether they should stand upon their original rejection of the whole claim?"

On the ground that it was leading. Which objection was by counsel for plaintiff then and there

confessed, following the comment of the Court that it was leading. Notwithstanding said objection the witness was permitted to testify as follows:

"A. The Board would only pay the amount necessary to complete the original plans and specifications, and they agreed to pay the other extras with the exception of the Nichols —or the Perkins' extras, which they would not pay, so that the money that they allowed was in—was an application of first—on the former.

Q. Well, what I want to know, what was being discussed was it a previous demand or was it?

A. Well, we were discussing the extra work involved in November—in the November discussion. All of the extra work had been completed before.

The COURT.—Q. November claim?

A. Yes, the extra work had been completed then.

Mr. STONEMAN.—Was the amount of $6,204.62, which you finally accepted on December 3, an amount that was included in the November demand?

A. Well, part of it was, yes." [178]

20. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

"Mr. STONEMAN.—Q. Do you know why the words, 'together with extras herein listed' was placed in there?"

(Referring to the demand of Dec. 3, 1917.)

On the ground that it called for a conclusion and that the instrument itself is susceptible of easy interpretation.

Thereupon, the following proceedings were had:

"Mr. STONEMAN.—The witness says that he directed that to be put in there.

Mr. CLARK.—I understand that he did.

The COURT.—Yes, but the instrument itself does not show why that language was used. I think it is proper evidence in explanation of the document. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Yes, the reason for that wording was to differentiate the extras mentioned and specifically enumerate here from the Merritt extras or the extras involved by reason of changes in the plans at the specific request of Mr. Merritt of the Indian Department and the extras involved by reason of the changes in the plans at the suggestion of Mr. Perkins."

21. The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel, upon redirect examination:

"Mr. STONEMAN.—Mr. Mesmer, can't you

put the conditions under which you state that you were paid $6,204.00 by the Board of Supervisors on December 3, 1917—Will you please state to me again your understanding of the conditions under which that payment was made and how you accepted it?"

Upon the ground that is was not proper redirect; that it had been fully stated by this witness more than once what his understanding was in both direct and cross-examination. [179] That it called for a conclusion of the witness. That there was not any ambiguity in the contract. That it is susceptible of easy interpretation and speaks for itself.

Notwithstanding said objections the witness was thereupon permitted to testify as follows:

"A. The Board—I will give in conclusion this thing The Board said to me as follows: 'We will give you the difference between the amount of $23,800.00 and the amounts we have already paid you, and in addition thereto, we will give you the Dubree extras and we will give you the Merritt extras, but we won't give you the extras involved by reason of Perkins' changes' and I said: 'Gentlemen, that won't do. I will tell you what I will do. I will take the difference between the $23,800.00—'

Q. $23,000.00?

A. Yes. '—and what you have already paid me and the Dubree extras but I won't take the Merritt extras, because it will cloud the

question of the Perkins' extras, which are involved with, and a part of, you might say, of the Merritt extras. It is difficult between the two lines to draw just where Merritt's and Perkins' come together."

22. The said United States District Court erred in denying the following motion to strike made at the conclusion of the examination of the said Louis F. Mesmer, plaintiff:

"Mr. CLARK.—Before any further testimony is put on, we desire to move that all of the testimony of Mr. Mesmer as to the value of these extras claimed by him be stricken on the ground: First, that all those things that he set forth of what was required by the Indian Department are provided for in the contract itself; secondly, on the ground that no demand covering these extras, as testified to by Mr. Mesmer, was filed with the County of Navajo in the manner and form as required by the statutes of Arizona within six months from the date of the last item."

23. The said United States District Court erred in overruling defendant's objection to the following question propounded by plaintiff's attorney to W. H. Popert, witness for the plaintiff:

"Mr. STONEMAN.—Could the bridge have been constructed for $23,800.00 exclusive of these modifications." [180]

upon the ground that it was immaterial.

Thereupon, after several intervening questions

and some discussion the witness was permitted to, and did, answer "No."

24. The said United States District Court erred in overruling defendant's objection to the following question propounded to W. H. Popert, witness for the plaintiff:

> "Mr. STONEMAN.—Q. Now with reference to the phrase, as it appears in the contract by Plaintiff's Exhibit 3, 'substructure to be as follows: as per *addenda* for extras upon the proposal accepted.' Do you know how that phrasing happened to be inserted, not only in this memorandum, being Defendant's Exhibit 'A,' but finally in the contract? Do you know? Say yes or no, please. A. Yes, I know.
>
> Q. Now, go ahead and tell the reason why."

Upon the ground that is was immaterial. Notwithstanding said objection the witness was permitted to testify as follows:

> "A. As I remember, in the original pencil draft, of which this is, I believe, a copy, we wanted to be sure that any materials to be furnished above that shown on the original blue-print and called for in the original proposal should be paid for irrespective of the description which might follow here. I can't say whether I inserted this or the Engineer or the Attorney but it was agreed upon at that time in the conference that these words should appear in the contract or words similar in effect which would be satisfactory to the County Attorney. Does that answer the question?"

25. The said United States District Court erred in overruling defendant's objection to the following question propounded to the same witness, W. H. Popert, during his direct examination:

> "Mr. STONEMAN.—Is there any reason why it was not possible at that time to say that the bridge should be built for $23,800.00, or for any other sum?"

On the ground that it called for a conclusion.

Notwithstanding said objection the witness was permitted [181] to testify as follows:

> "A. The proposal called for the construction of a particular bridge for a particular price. It was known that there would be certain modifications to be made. It was not possible to anticipate those modifications before the contract was executed. Further, the contractor believed that it would not be legal to modify the price named in the original proposal."

26. The said United States District Court erred in overruling defendant's objection to the following question asked of said witness, Popert, upon his direct examination:

> "Q. Was there any discussion between you and Mr. Mesmer and Mr. Perkins, the County Engineer, as to the meaning of the phrase 'substructure as per *addenda* for extras herewith'?"

On the ground that it was immaterial, that being a legal matter by which the county of Navajo could not be bound. Notwithstanding said objection the witness was permitted to testify as follows:

"A. Well, in order to save the time, I will make my answer as brief as possible. The sum and substance of the discussion was that if there should be any alterations—any additions to the original plan and bid that they should be paid for as provided by the proposal."

27. The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

"Mr. STONEMAN.—Was there any question at that time expressed by Mr. Perkins—any claim by him that Mesmer & Rice were to construct this bridge with these changes suggested by him for the sum of $23,800.00?"

On the ground that it was leading and immaterial.

Notwithstanding said objection said witness was permitted to testify as follows:

"A. I will say that the understanding was that whatever additional material was required to that called for in the original plan and bid would be paid for."

28. The said United States District Court erred [182] in overruling defendant's objection to the following question asked of said witness, Popert, on his direct examination, by counsel for plaintiff:

"Mr. STONEMAN.—Did Mr. Perkins say anything to you before the contract was signed as to whether or not he understood that the substructure commencing in the paragraph of

Plaintiff's Exhibit 3, being the contract where 'substructure' is used, *where* to be paid for at the unit prices or were to be paid for as per *addenda* for extras or were to be paid for out of the flat sum of $23,800.00?"

On the ground that it called for a conclusion, that it was hearsay and immaterial. Notwithstanding said objection said witness was permitted to testify as follows:

"A. In a few words, the extra material as roughly described in contract for the substructure, extra material over that shown on the blue-print, 4183, should be paid for at the unit prices specified in the proposal. Well, I am trying to save my words and time as much as possible."

29. The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

"Mr. STONEMAN.—Have you made a calculation, Mr. Popert, of the different items of materials used in the substructure for the purpose of showing the cost of the substructure based upon prices used in the contract, under the *addenda* clause. Have you made a calculation, yes or no?

A. Yes, I have.

Q. Will you read into the record the result of that calculation.

Mr. CLARK.—Are you asking (items) unpaid for to be read into the record?

Mr. STONEMAN.—Yes."

On the ground that it was immaterial and a matter to be determined by the Court itself.

Notwithstanding said objection the witness was permitted to testify at length as to the result of his calculations. [183]

30. The said United States District Court erred in overruling defendant's objection to the following question propounded on the 20th day of March, 1924, to the witness, Popert, on redirect examination:

> "Mr. STONEMAN.—Have you made a computation for the purpose of showing the cost of the material used in the construction of the bridge under the requirements of Mr. Perkins?
>
> A. I have.
>
> Q. Is it itemized as to the different character of material? A. It is.
>
> Q. Will you please give me the results of your computation?"

On the ground that it was immaterial, as the matter was already settled by the contract and because no demand was ever presented to the Board of Supervisors within six months from the furnishing of these items.

Notwithstanding this objection the witness was permitted to testify as to the items embraced in his computation, showing a total of $13,900.00.

31. The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, by counsel for plaintiff:

"So that, until those supplemental plans and specifications had been approved by the Indian Department it was not possible was it, under the contract itself, to determine what either the extent of the changes, which in this case have been called extras, or the quantity or amount of the changes?

A. No, it was not possible to determine that.

Q. Now, did that consideration have anything to do with the wording of this clause of the contract as it was worded, that is, that all of the preliminary specification stated in the contract were to be paid for as per *addenda* for extras upon the proposal accepted?"

Upon the ground that it was immaterial and because that very phrase, the so-called *addenda* phrase, is in the bid and proposal of this plaintiff, made long before this contract, [184] or any part of it, was ever made.

32. The said United States District Court erred in overruling the defendant's objection to the following question propounded by counsel for plaintiff to said witness Popert:

"Q. That November claim appears to be divided into two parts, one part according to the interpretation of the contract placed upon it by the Board and the other part according to the interpretation placed upon the contract by Mr. Mesmer. Is that true and was that intended by you to be shown?

Mr. CLARK.—Are you speaking of the demand of November 5?

Mr. STONEMAN.—Yes, sir.

Mr. CLARK.—Well, we object. It is immaterial.

The COURT.—It speaks for itself?

Mr. CLARK.—The demand shows upon its face just what it is."

Notwithstanding said objection the witness was permitted to testify as follows:

"That is correct—If you mean that the second paragraph should be in with the first paragraph in the contractor's interpretation—the two should be added together."

33. The said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to the witness Popert:

"Mr. STONEMAN.—Did you hear at that meeting on December 3 any member of the Board of Supervisors offer to pay any additional money to the Merritt Extras and the sum of $6,204.00?"

Upon the ground that it was immaterial and that whoever made such statement offered it as a compromise that was unaccepted, proof of which would be inadmissible in any event.

Whereupon, counsel for plaintiff stated as follows:

"Mr. STONEMAN.—It is not for that purpose. It is for the purpose of showing that it was the November demand which was in contemplation and being considered."

Notwithstanding said objection the witness was [185] permitted to testify as follows:

"A. Your Honor, I can save time by saying, while I don't remember the exact name, I know that the Board felt as though they wanted to pay something—they wanted to do something to have the contractor satisfied and one of the members of the Board said that he would pay a thousand dollars extra and asked if that was satisfactory to Mr. Mesmer. Does that answer your question?"

34. The said United States District Court erred in sustaining the objection of plaintiff to the following question propounded by counsel for plaintiff to said witness Popert, upon cross-examination:

"Mr. CLARK.—Did you have anything to do, Mr. Popert, with preparing or assisting in the preparation of the original bill in equity that was filed in this court by Mr. Mesmer?

(No answer.)

I will put it a little differently. Q. Did you have anything to do yith furnishing the information to Mr. Stoneman upon which that bill in equity was drawn? Did you consult with him as to any of the information used by him in making up that complaint at all?"

Upon the ground that it was irrelevant and immaterial. To which objection, upon suggestion of the Court, counsel for the plaintiff added that it was not proper cross-examination, unless it is an attempt to impeach the witness, in which event no proper foundation is laid. Thereupon, counsel for de-

fendant read from paragraph 4 of said bill in equity as follows:

> "Complainant avers that under the terms of such contract he entered upon the construction of such bridge but that thereafter from time to time during the performance of the labor by complainant in the construction of said bridge, defendant, through its officers and agents, proposed to require of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras as set forth in said proposal, contract and specifications."

Notwithstanding the reading of said paragraph 4, the ruling on said objection was adhered to. [186]

35. The said United States District Court erred in overruling defendant's objection to the following question propounded to R. C. Creswell, a witness in behalf of the defendant, upon his cross-examination by counsel for plaintiff:

> "Mr. STONEMAN.—Did you not know that when the bridge was finally constructed by Mr. Mesmer that it was not being constructed by Mr. Mesmer, that it was not being constructed under the proposal and the plans and specifications originally submitted to him?"

Upon the ground that the contract at that time controlled and that the contract speaks for itself as to those matters.

Notwithstanding said objection the Court then propounded said witness the following question:

> "The COURT.—Did you not know at the time this bridge was being constructed that it was not being constructed under the plans and specifications as made in the proposal of Mr. Mesmer before the contract was accepted? Before the award was made. Did you not know that the bridge was not being constructed in accordance with those plans?"

Notwithstanding the objection the witness was permitted to testify as follows:

> "A. Well, there was some little heavier parts but, as I understood from the Engineer at that time, it did not amount to but very little."

36. The said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to said witness, R. C. Creswell, during the cross-examination:

> "Mr. STONEMAN.—Didn't you know, Mr. Creswell, that Mr. Mesmer, in addition to the amount that he said that he would build this bridge for originally under his original proposal and specifications would have to pay out more money for material if he built it under the specifications as recommended by Jordan—by Perkins, your county engineer?"

On the ground that that was assumed by the contractor in his contract. That it was immaterial and a matter that was determined by the contract which speaks for itself. [187] That it was an attempt to have this witness interpret the contract.

Notwithstanding said objection the witness was permitted to answer saying "No." That it was his understanding that they were to build a bridge for the contract price of $23,800.00.

37. That said United States District Court erred in denying defendant's motion for judgment filed herein and served upon counsel for plaintiff on the 21st day of May, 1924, as follows:

> "Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:
>
> 1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435 Revised Statutes of Arizona.
>
> 2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called 'extras' which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6th. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge

[188] and which were set forth in the contract, were to be *paid* for as 'extras.'

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a a 'memorandum of points and authorities,' in support of this action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant."

Said motion was denied by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plaintiff in the sum of $13,872.65, to which judgment and ruling, under and by virtue of its exception thereto, the defendant duly excepted.

38. The said United States District Court erred in rendering judgment in favor of plaintiff and against the defendant, as aforesaid, for the sum of

$13,872.65, on the 8th day of July, 1924, for all of the reasons and upon all the grounds set forth in the foregoing assignment of errors and defendant's motion for judgment.

WHEREFORE, by reason of the errors aforesaid, the defendant, Navajo County, prays that the judgment rendered and entered in this action be adjudged and decreed to be void; that the same be annulled and reversed, and that the said [189] District Court of the United States, District of Arizona, be directed to grant a new trial of this cause, or that this Court, because of said errors, cause a judgment to be entered in favor of the defendant.

THORWALD LARSON,
County Attorney.
E. S. CLARK,
NEIL C. CLARK,
Attorneys for Defendant. [190]

PLAINTIFF'S EXHIBIT No. 19.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz., May 7, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of SEVENTEEN THOUSAND EIGHT HUNDRED FIFTY-SIX and no/100 DOLLARS in payment of invoice of April 4th, for steel delivered, the items of which are heretofore annexed.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the following is a just

and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items hereunto annexed are true and correct in *very* point and particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) MESMER & RICE.

Subscribed and sworn to before me this 7th day of May, 1917.

_____.

My commission expires:

66

STEEL FOR LITTLE COLORADO RIVER BRIDGE, NEAR WINSLOW, ARIZONA.

Trusses	103	tons	
Joists	74	tons	
Railings	7¼	tons	
Cylinders	13¼	tons	
Other steel	38¼	tons	
Total	186	tons @ 120	
			$22,320.00
Less hold-back of 20% as per contract			4,464.00
Amount due.			$17,856.00

Admitted and filed Mar. 18, 1924.

C. R. McFALL,
Clerk. [191]

EXHIBIT No. 4.

REPORT OF THE COUNTY ENGINEER UPON PROPOSALS FOR CONSTRUCTION OF BRIDGES.

To the Honorable Board of Supervisors,
Navajo County, Arizona.

Gentlemen:

Responsive to your invitation for bids for the construction of bridges under the proceeds of the recent bond issue for that purpose, there were received at your office on July 3rd, and referred to the Engineer's office for report on this date, proposals from nine separate companies or individuals aggregating in the different combinations of super and substructures, fifteen hundred and forty-three distinct propositions.

This office has diligently worked and reviewed each and every one and on account of structural defects and local requirements 1260 of these proposals have been eliminated. Accompanying this report is a tabulated sheet of the remaining 283 proposals, which graphically presents and compares to you a summary which can be easily and quickly deduced. This office has likewise carefully weighed the advantages and disadvantages of the plans and these costs tabulated.

"Consultation has been made with the Engineers of the State and those of the A. T. and S. F. R. R. Company."

For the construction of the bridge near Winslow there is an appropriation of $15,000.00 conditioned

upon a like amount being appropriated and used by Navajo County, for this purpose, making a total of $30,000.00 for the bridge named which is amply sufficient to cover the cost of the super and substructures and the necessary approaches.

This office has certified to the Indian Department that the County of Navajo has appropriated and set apart the sum of $15,000 or more, which was and is available to be used for the construction of a bridge east of Winslow, and has had conversation by phone with the agent at Leupp relative to this. Mr. Janus, the agent, gives assurance that the $15,-000.00 appropriation by Congress is available, and requested that a copy of the accepted plans, specifications and construction be forwarded to him.

At this time I suggest and recommend that an invitation be extended to the Indian Department through Mr. Janus, to co-operat*ive* in the construction of the Winslow bridge by detailing an inspction engineer to act jointly with the County Engineer upon that bridge. I think this invitation essential and desirable.

Of the plans presented there are those of a six span bridge, a five span bridge, a thre span bridge, a two span bridge and a one span suspension bridge. Although except*ly* desirable at this point, the single suspension span must be eliminated from contemplation for the reasons of difficulties of constructing abutments of sufficient bearing resistance to sustain the [192] weight imposed, and that of one guy terminal falling in the center of stream bed of Cottonwood Creek.

The short spans at this point will entail excessive pier cost in preparing assured foundations which are absolutely necessary.

For the foregoing reasons this office has selected and recommends that a bridge of two spans of 200 and 48 feet, 6 inches each, as submitted and proposed by bidder No. 7 be adopted. The price stipulated is $121,115.00, with the addition of extra cost, for addition length of piling and yardage of concrete and all other items enumerated within the proposal, which with the cost of approaches will consume the total adopted $30,000.00 and more.

In comparing the relative cost of the remaining bridges advertised between the various bidders, it is found that those under No. 7 compare favorably and are the best. In fact, the total cost of the most desirable plans as made by this bidder, assuming $15,000.00 is the sum of the County money to be set apart for the Winslow bridge, is $51,863.00. The only other summary of tabulated bids which less than this stipulates a five span bridge at Winslow and the next highest which also contemplates a five span is $52,110.00; in fact, bidder No. 7 has presented the only proposal for a two span bridge.

In addition to the reasons given in the former paragraph, the expenditure for pier cost can with advantage be concentrated upon one pier at the center of the stream, where the brunt of the current, scour and force of drift are maximum.

The bridges selected and hereby recommended by this office are such as are most suitable to the respective localities, most serviceable, economical,

stable and fully meet the conditions contemplated and desired. They are as follows:

(See Tabulation Sheet No. 7.) Bridge No. 1, (T–3) over Little Colorado east of Winslow. 2 spans of 248′6″ each.

Piers to be three in number of 2 steel tubes, the center pier tubing of 72″ diameter those at each end of 48″ diameter; 12 to 16 feet below stream level with piling driven within to a refusal sufficient to sustain a load of not less than fifteen tons to each piling; tubes to be filled with a rich concrete mixture; superimposed upon these concrete-filled tubes, a reinforced concrete pier to be raised to a height of two feet above the level of the bottom chord of the adjacent A. T. & S. F. R. R. bridge. Superstructure to be two pin bow steel spans, 248′ 6″ each resting on the piers specified, 14′ roadway, steel joists, wood 3″ floor, and lattice hand rail.

The foregoing provisions are included in the proposal made.

Bridge No. 2 (T–2) over Cottonwood east of Winslow:

1 Span of 129′ resting on piers of the construction identical with the preceding, excepting that the tubing to be three in number for each pier and 36″ in diameter, piling driven 16′. The superstructure to be 1 span 129′ in length of the pin bow style, roadway 14, steel joists, 3″ wood floor, lattice railing.

Cost—$3,720.00 [193]

Bridge No. 3 (V–1) over Little Colorado near St. Joseph.

6 Spans of 84′ 4″ each resting upon piers con-

sisting of 2 steel tubes, 48″ in diameter with piles driven within in sufficient number and to the required depth to sustain the load to be imposed, tubes to be filled with a rich concrete mixture; superimposed upon these tubes to be reinforced concrete pier to the specified height. The superstructure to a pin connected steel pong trusses as designed in the proposal, 14′ roadway, steel joists, 3″ wood floor, lattice railing.

Cost—$14,775.00

Bridge No. 4 (T–1) over La Roux Fork west of Holbrook.

2–80′ spans resting upon piers identical with those designated for Bridge V–1. The superstructure to be of the pin connected type as designated in the proposal, 14′ roadway steel joists, 3″ wood floor, lattice railing.

Cost—$3,619.00

Bridge No. 5 (&–2) over La Roux Fork north of Holbrook.

The design of this bridge and piers to be identical with that designated for Bridge No. 4 (T–1).

Cost—$3,919.00.

Bridge No. 6 (&–3) Cottonwood on Keam's Canon Road.

1 Span of 80′ resting on piers of solid concrete superimposed upon piling. The superstructure to be a pin connected truss, 14′ roadway, steel joists, 3″ wood floor, lattice railing.

Cost—$2,600.00

Bridge No. 7 (A–2) Cottonwood near Snowflake. 2 Spans of 130′ each resting on piers consisting

of H steel piling driven to an extreme depth and extending to the height of the shoe of the superstructure. The supersurface portion to be inclosed within a block of reinforced concrete carried down below the scour of the stream. On account of different subsurface conditions at this point a radically different style of substructure has been adopted The water-way of 160′ at this bridge is 100′ wider than that of the original estimate made by this office in 1915.

The superstructure to be two pin connected steel trusses, 14′ roadway, steel joists, 3″ wood floor, lattice railing.

Cost—$8,230.00

Bridge No. 8 (N.1) over Silver Creek near Snowflake.

It was intended and agreed that this bridge should be reconstructed out of material now on hand, but owing to changed conditions it is deemed advisable to award the work of erecting this bridge in addition to the other contracts, using 2 steel spans, 1 of 77′ and 1 of 52′ now on hand consisting of [194] new and intact member, resting upon piers to be constructed in the style and manner as those designated for the preceding bridge—No. 7.

Cost—$—Minimum

Bridge No. 9 (C–2) over Colorado south of Woodruff.

This is a short span and little work is involved, as the material is on hand and agreement has been made to erect this bridge by local labor.

Cost—$—Minimum

The original estimate of this office for the con-

struction of these 9 bridges was $63,000.00. Considering the unprecedented advance in the prices of structural steel since that estimate was made, it is gratifying to find that the sum is still adequate. Furthermore, an investigation has been made by this office relative to the supply of steel available in different localities of the United States, and the consequent ability of bridge contractors to furnish, erect and complete within a reasonable time the work under contemplation. With no intention of disparagement of other bidders, it is found that bidder No. 7 stands well toward the head of the list in this particular; it not only being a reliable contractor but a constructor of bridges within its own shops. It is, as well, fully able to guarantee its design to meet the standard requirements usual for this kind of work, and this guarantee should be incorporated in all contracts. Copper's General Specifications for Highway Bridges has been adapted as this standard and should be named as a guide for construction. In the course of investigation the fact developed that the bidder named was equipped and capable to prosecute and complete all of the work within a minimum time limit.

The items of major importance in all bridges are foundations and these must be such as will be stable and safe under all conditions which may arise.

In the general preliminary specifications which issued from this office, an advisory plan for piers was given and although this plan has since then received the commendation of several reputable engineers, it is recommended that it be left optional with

the County Engineer to substitute by agreement where desirable concrete filled large steel tubes for the subsurface portion of these piers in place of the solid block of concrete specified. This in no way will change the original plan for the subsurface portion nor be detrimental. Tubes in all cases will be of sufficient area to receive piling adequate to sustain the load to be imposed, viz., not more than 15 tons upon each pile.

In the final summary it will be seen that with reasonable care, excellent bridges, as adopted, can be constructed, inclusive of the approaches in all the 9 locations stipulated for or within the amount of the original estimate—$63,000.00.

As this office has used all diligence, care and has had consultation in ascertaining and weighing the facts and figures presented, it is presumed that the Honorable Board will not desire an exhaustive explanation of these, as they are such that can be and are set forth in a graphic form on the accompanying tabulation sheet.

Owing to the fact that the utmost deliberation has been [195] taken since the inception, adoption and receipt of the bridge, bond funds, and that the season has advanced to the most desirable time to commence construction work, it seems imperative that these contracts should be awarded and the work be put under way immediately. The pressure of public opinion seems to be in favor of this.

Respectfully submitted,

CHARLES E. PERKINS,

County Engineer.

[Endorsed]: Assignment of Errors. Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [196]

In the District Court of the United States, District of Arizona.

No. 56—PRESCOTT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

Upon motion of Thorwald Larson, County Attorney, and E. S. Clark and N. C. Clark, attorneys for the above-named defendant, Navajo County, and upon filing a petition for writ of error with assignment of errors duly set out.

IT IS ORDERED that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein; and

IT IS FURTHER ORDERED that upon the filing of a bond in the sum of Fifteen thousand ($15,000) Dollars by the defendant, approved by

the Judge of this court, that all further proceedings herein shall be suspended until the determination of this writ of error by the said Circuit Court of Appeals.

Dated this 25th day of October, 1924.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy. [197]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. L–56—PRCT.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States to the Honorable Judges of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is

now in the said District Court before you, between Navajo County, plaintiff in error, and Louis Mesmer, defendant in error, a manifest error has happened to the damage of Navajo County, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, [198] in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 25th day of October, in the year of our Lord one thousand nine hundred and twenty-four (1924).

[Seal] C. R. McFALL,
Clerk of the United States District Court for the District of Arizona.

By Paul Dickason,
Chief Deputy Clerk.

Allowed this —— day of October, 1924.

_____,

Judge of the United States District Court for the District of Arizona.

[Endorsed]: Filed Oct. 25, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk.

RETURN ON WRIT OF ERROR.

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court.

[Seal] C. R. McFALL,

Clerk of the United States District Court for the District of Arizona.

By M. R. Malcolm,
Deputy. [199]

In the United States District Court for the District of Arizona.

No. 56—PRESCOTT.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon the writ of error heretofore sued out herein by the said Navajo County, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Plaintiff's original bill of equity.
2. Summons and return of service.
3. Plaintiff's original complaint.
4. Defendant's demurrer.
5. Defendant's motion to make more definite and certain.
6. Defendant's answer (motion to strike, etc., included).
7. Plaintiff's amended complaint.

8. Plaintiff's substitute paragraphs VI and VIII of amended complaint.
9. Defendant's answer to substitute paragraphs VI and VIII.
10. Defendant's motion for judgment. [200]
11. The judgment.
12. All minute entries in this cause.
13. Bill of exceptions.
13a. Proposed amendments to bill of exceptions.
14. Petition for writ of error.
15. Assignment of errors.
16. Supersedeas bond and approval.
17. Order allowing writ of error.
18. Original writ of error.
19. Original citation on writ of error.
20. All exhibits.
21. This praecipe.
22. Clerk's certificate.

The said transcript is to be filed with the clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before

THORWALD LARSON,
County Attorney.
E. S. CLARK,
NEIL C. CLARK,
Attorneys for Navajo County, Defendant and Plaintiff in Error.

[Endorsed]: Filed Oct. 25, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [201]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. L–56—PRCT.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To Louis Mesmer, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, on the 24th day of November, 1924, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein Navajo County is plaintiff in error and Louis Mesmer is defendant in error, and there to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 25th day of October, 1924.

F. C. JACOBS,
United States District Judge for the District of Arizona. [202]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. L–56—PRCT.

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

ADMISSION OF SERVICE OF CITATION ON WRIT OF ERROR.

Service of the foregoing citation in the above-entitled action is hereby admitted and accepted this 30th day of October, 1924.

GEORGE J. STONEMAN,
Attorney for Louis F. Mesmer,
1200 Broadway Arcade Bldg., Los Angeles Calif.

Received this writ on the 28th day of October, 1924, and executed the same by delivering a copy of this writ to George J. Stoneman, attorney of

record for the plaintiff, on the 30th day of October, 1924.

G. A. MAUK,
United States Marshal.
By W. P. McNair,
Deputy.

[Endorsed]: Filed Nov. 1, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [203]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, November 24th, 1924.)

No. L–56—(PRESCOTT).

LOUIS F. MESMER, etc.,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

MINUTES OF COURT—NOVEMBER 24, 1924—ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS.

It is ordered by the Court that the clerk of this court is hereby authorized and directed to send up to the Circuit Court of Appeals all of the original

exhibits introduced and admitted in evidence at the trial of this case with the transcript of the record. [204]

In the United States District Court, District of Arizona.

No. L–56.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

APPLICATION OF ENLARGEMENT OF TIME TO FILE RECORD.

Comes now Navajo County, defendant herein, and applicant for writ of error to the United States Circuit Court of Appeals for the 9th Circuit, and respectfully applies to the Court to enlarge the time within which the record herein may be transmitted to said Circuit Court of Appeals, and in support of said application the said defendant submits the following grounds:

1. That November 24, 1924, the date of this application, is the return day and the day upon which said record should be lodged in said Circuit Court of Appeals.

2. That defendant has been delayed without

fault on its part, in securing the necessary supersedeas bond, having first applied to a number of surety companies, doing business in Arizona, and after losing a great deal of time, was advised that said companies did not write such bond.

3. That the defendant then procured the execution of a personal bond which was mailed from Holbrook, Arizona, to counsel for defendant, on the 22d day of November, 1924, as counsel [205] was advised by wire from the clerk of the Board of Supervisors of Navajo County. That said bond has not reached Phoenix and defendant's counsel are now tracing same.

That because of the foregoing circumstances defendant requests that the time within which said record may be transmitted to the United States Circuit Court of Appeals for the 9th Circuit be enlarged for the period of ten days, as provided in Rule 16 of said Circuit Court of Appeals.

Dated at Phoenix, Arizona, November 24, 1924.

THORWALD LARSON,
Co. Atty.

CLARK & CLARK,
Attorneys for Defendant.

[Endorsed]: Application of Enlargement of Time to File Record. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [206]

In the United States District Court for the District of Arizona.

No. L–56.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

ORDER ENLARGING TIME TO AND INCLUDING DECEMBER 4, 1924, FOR FILING RECORD WITH THE CLERK OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The defendant, and plaintiff in error herein, having applied for an enlargement of time within which to file the record of this case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and said application having been duly considered, and it appearing to the Judge of this court, who signed the citation for said writ of error, that good cause exists for said enlargement,—

IT IS HEREBY ORDERED, that the time within which said record may be filed and docketed be, and the same is, hereby enlarged for the period of ten days from and after the date hereof, to

wit, until and including the 4th day of December, 1924.

Dated this 24th day of November, 1924.

F. C. JACOBS,

Judge of the United States District Court, District of Arizona.

[Endorsed]: Order Enlarging Time for Filing Record with the Clerk of the United States Circuit Court of Appeals. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [207]

In the United States District Court, District of Arizona.

No. 56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Plaintiff,

vs.

NAVAJO COUNTY,

Defendant.

SUPERSEDEAS AND APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Navajo County, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Louis F. Mesmer, in the sum of Fifteen Thousand ($15,000.00) Dollars, to be paid to the said Louis F. Mesmer, his

successors and assigns, for payment of which, well and truly to be made, we bind ourselves, our administrators, executors and assigns, jointly and severally by these presents.

Signed and dated this 22d day of November, 1924.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Arizona, sitting at Phoenix in said District in a suit pending in said court between Louis F. Mesmer as plaintiff, and Navajo County, as defendant, Cause No. L–56 on the Law Docket of said court, final judgment was rendered against said Navajo County in the sum of Thirteen Thousand Eight Hundred and Seventy-two 65/100 ($13,972.65) Dollars, and costs taxed at One Hundred and Fifty-two Dollars and Ten Cents ($152.10), with interest thereon at the rate of six per cent (6%) per annum from date thereof [208] until paid; and the said Navajo County has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of said court in said suit, and a citation directed to said Louis F. Mesmer, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, according to law within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such that if the said Navajo County shall prosecute its writ of error to effect and answer all damages and

costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NAVAJO COUNTY.
By C. E. OWENS,
C. G. PAYNE,
JOSEPH PETERSON,
Its Board of Supervisors.

[Seal of Navajo County]
Attest: WALLACE ELLSWORTH,
Clerk of the Board of Supervisors.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Surety.

[Corporate Seal] LLOYD C. HENNING,
Attorney-in-Fact.

Approved this 25th day of November, 1924.
F. C. JACOBS,
Judge.

[Endorsed]: Supersedeas and Appeal Bond. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [209]

In the United States District Court, District of Arizona.

No. 56—PRESCOTT.

LOUIS F. MESMER, an Individual, Doing Business Under the Name and Style of MESMER & RICE,

Complainant,

vs.

NAVAJO COUNTY,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Louis Mesmer, an Individual, *versus* Navajo County, said case being Number 56—Prescott on the docket of said court.

I further certify that the foregoing 209 pages, numbered from 1 to 209, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this tran-

script as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed [210] to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Ninety-four and 80/100 Dollars ($94.80), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and seal of said court this 29th day of November, 1924.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

By Paul Dickason,
Chief Deputy. [211]

[Endorsed]: No. 4412. United States Circuit Court of Appeals for the Ninth Circuit. Navajo County, Plaintiff in Error, vs. Louis F. Mesmer, an Individual Doing Business Under the Name and Style of Mesmer & Rice, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed December 1, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4412

United States
Circuit Court of Appeals
For the Ninth Circuit

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Arizona

THORWALD LARSON,
County Attorney,

E. S. CLARK,
NEIL C. CLARK,
Attorneys for Plaintiff
in Error.

Filed....., 1925.

.....
Clerk.

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

NAVAJO COUNTY, PLAINTIFF IN ERROR, -v- LOUIS F. MESMER, an individual, doing business under the firm name and style of MESMER & RICE, DEFENDANT IN ERROR.	NO. 4412

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This case arises on a contract entered into on the 5th day of September, 1916, between the defendant in error as contractor, and the plaintiff in error, Navajo County, wherein the contractor agreed to build a certain bridge across the Little Colorado River in Navajo County, Arizona, for the sum of $23,800.00. This contract is set out in full in the amended complaint filed by defendant

in error, as plaintiff in the trial court. (Tr. Rec. pp 68, et. seq.) The contract, in so far as the principal questions here presented, are concerned, is as follows:

THIS AGREEMENT, made and entered into this 5th day of September, A. D., 1916, by and between Navajo County, Arizona, by and through its Board of Supervisors, party of the first part, and Louis F. Mesmer, doing business under the name of Mesmer & Rice, Los Angeles, California, the party of the second part,

WHEREAS, the party of the first part heretofore advertised for bids for the construction and building of certain bridges and,

WHEREAS, said bids were received at the office of the Board of Supervisors of Navajo County, Arizona, and opened the 3rd day of July, A. D., 1916, for the constructing and building of the bridge hereinafter mentioned, and

WHEREAS, the party of the second part submitted bid for construction and building said bridge, and

WHEREAS, the said bid of the party of the second part appears to be the lowest and best bid received, and was accepted by the County of Navajo, by and through its Board of Supervisors, and

WHEREAS, for the purpose of identification and to set forth more fully the provsions and stipulations of this contract, said call for bids with speci-

fications for such bridge is hereto attached and made a part hereof, and

WHEREAS, FOR THE same purposes the said bids are hereto attached, and made a part hereof, and

WHEREAS the party of the second part has agreed and by these presents does agree to construct and build the bridge hereinafter described, for the sum of twenty-three thousand eight hundred and no.100 ($23,800.00) dollars,

NOW, THEREFORE, the said party of the second part has agreed and by these presents does agree to and with the party of the first part, for and in consideration of twenty-three thousand eight hundred and no/100 ($23,800.00) dollars, to furnish all the materials and labor therefor, and in an efficient and womanlike manner, and according to the plans and specifications designated and attached hereto and made a part hereof, to construct and erect the following bridge, upon the site herein named to wit:

Bridge T-3 over Little Colorado River, east of Winslow.

Superstructure: 3-165', riveted H. T. steel spans as per superstructure plan on Drawing No. 4183; substructure to be as follows (as per addenda for extras upon the proposal accepted); river piers to consist of two steel cylinders, the lower sixteen feet to be 8' in diam., filled with a rich concrete resting upon twelve piles drives to a refusal of a fifteen tons load each; the upper steel cylinder to be fifteen

feet in length or such that its upper end will be level with a point two feet above the bottom chord of the adjoining A.T. & S.F. R.R. Bridge, the lower end to be 12 ins. above the upper end of the lower tube, to be 6ft. in diam, and filled with a rich concrete mixture connected with the lower concrete by 12 1" twisted reinforcing bars; the two upper cylinders of each pier to be connected by and 18" reinforced concrete wall of an equal length with the said upper cylinders and abutments to consist of two thirty-foot steel cylinders, each, six feet in diam. filled with a rich concrete resting on seven piles driven to a refusal of a fifteen tons load each, the upper fifteen feet to be locked together with an eighteen inch reinforced concrete web wall.

It is further agreed that in the event of any changes being made by the party of the first part, or any extras required by the party of the first part, such charges of extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof.

It is further agreed that the party of the second part will complete all the work on the bridge hereinbefore described, according to the contract, plans and specifications, on or before six months from the date of this contract and the said party of the first part agrees to permit and allow the party of the second part to have free use of the right of way at or near the place for the erection and construction of trestle work and other purposes, as may be necessary for the convenience of the party

of the second part, in constructing said bridge in accordance with Clause 7 of specifications hereto attached and made a part hereof.

It is also agreed that the said party of the first part will pay to the said party of the second part, at intervals of thirty days apart, eighty per cent (80%) of the percentage of labor performed and material delivered during the preceding thirty days, with the understanding that the last payment due for and on account of the construction and building of the aforesaid bridge shall be made immediately after such bridge is approved and accepted by the party of the first part and all payments are to be made from the bridge bond fund in the manner prescribed by law.

It is also understood and agreed that Clause 3 of the specifications hereto attached and made a part hereof are followed in this contract.

* * * * *

In explanation of the paragraph commencing "Bridge T-3 over Little Colorado River east of Winslow", the bid or proposal of Mesmer to build this bridge called for lighter construction in some particulars than that described in this paragraph. These heavier portions were prescribed by the County Engineer, and by an assistant of the State Engineer, before the contract was signed, and were evidently intended by the County Engineer to meet not only the demands of safe construction, but also the requirements of the Indian Department, in view

of the fact that the government had appropriated $15,000 to be used by the county in paying for this bridge. However, these changes were not considered by the Indian Department as entailing any great additional cost. (Tr. Rec. p. 195, Second Par.) They did meet the approval of the Department, with some slight changes not necessary to be mentioned here so that in every essential respect the bridge was constructed as described in the contract, and as we contend, the contract bound Mesmer to build the bridge just as the contract described it, for the sum of $23,800.00 as proposed in his bid. (By inadvertence this bid was not printed, although sent up as a part of the record. Plaintiff in error requests that it be referred to and considered as though printed herewith.)

The principal controversy arises over the claim of Mesmer, plaintiff in the court below, for $13,-973.65 (Tr. Rec. p. 78, Par VI Amended Complaint) alleged to be due for "extras" said to have been put into the substructure of the bridge at the instance of the county and certain officers of the Indian Department of the United States, hereinbefore referred to. These "extras" as the plaintiff below insisted, represented the difference in cost of the substructure as specified in the proposal, and the substructure as described in the contract.

The plaintiff below contended that in so far as the substructure described in the contract requires heavier or additional material, or more work than

was required in the original plans and proposal, such difference should be paid for according to the "addenda" clause in the proposal, which reads as follows: (See p. 3)

> "If, after construction has started, it becomes apparent that additional quantities are required, we hereby propose to furnish:
>
> (a) Additional concrete in place ..... $20.00 per yd.
> (b) Additional structural steel in place ..... 7.5c per lb.
> (c) Additional reinforcing steel in place ..... .7c per lb.
> (d) All other work will be done on the percentage basis at actual cost plus 15%"

He bases this contention on that clause "as per addenda for extras upon the proposal accepted" occurring in the description of the substructure as contained in the contract. The defendant took the position that the contract called for the bridge just as described in the contract at the contract price, and that no extras were to be allowed unless "after construction had started, it became apparent that additional quantities were required".

On October 1, 1917, Mesmer filed a purported claim, or demand against Navajo County for "extra material and labor" in the construction of said bridge (Tr. Rec. p 196; Exhibit 9). This claim

on its face demanded a payment of $10,600.00 but as 20% had been deducted pursuant to the terms of the contract it represented a claim of $13,250.00, wholly for "extras". The Supervisors rejected the claim in toto on November 5, 1917, after having referred it to the County Engineer, as appears on the face of the demand. The same demand claimed $17,070.00 as payable "as per original contract and original plans".

On November 5, 1917, Mesmer filed another demand against the County, this time for $17,600.00 "as per original plans and original contract" and for "extras" in the net amount of $12,800.00, or, including the 20% retention, $16,000 for "extras" alone. (Tr. Rec. p. 197-198, Exhibit 10). This demand was also rejected on the same day it was filed. Neither of these demands or claims was itemized or attempted to be itemized as required by law. Paragraph 2434, Revised Statutes of Arizona, prescribes how a claim shall be made out. For convenience, we set out this paragraph:

"Every person having a claim against any county in this state, excepting those referred to in the provisions of this section, shall, within six months after the last item of the account accrues, present a demand therefor, in writing, to the board of supervisors of the county against which such claim or demand is held, verified by the affidavit of himself or agent, stating minutely what the claim is for, and specifying each several items and the date and

amount thereof; provided that the board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued; that nothing herein shall be held to apply to the claims for compensation due to jurors and witnesses, and for official salaries, which, by some express provision of law, is made a demand against the county."

This brings us to the first point wherein we assign error: That no claim for the "extras" sued upon herein was presented to the Board of Supervisors "stating minutely what the claim is for and specifying each several item and the date and amount thereof" within six months after the last item accrued. The entire controversy is over these so-called extras. That is all that is being sued for. (Tr. Rec. p. 159-106).

These "extras", according to the testimony of Mesmer, the plaintiff below, were all included in the demand of November 5, 1917. (Tr. Rec. p. 159, middle of page). All of the extra work had been completed before November 5 (Tr. Rec. p. 157; testimony of Mesmer) and all were included, as Mesmer testifies, in the demand filed on that date. (Same p. 159, although the demand does not disclose any itemization of extras—merely one gross

charge. The question of the validity of the claim was raised by defendant in the court below by numerous objections and motions (Tr. Rec. 102-128-129-133-165-174), all of which were overruled.

The bridge was completed on or before November 1, 1917. It was to have been completed in March. The substructure was all completed during the month of October, or at least before November 5. (Tr. Rec. 157, 7th line from foot of page; testimony of plaintiff).

On December 3, 1917, Mesmer presented another demand (Exhibit No. 11, Tr. Rec. p. 199-201) which we herewith submit:

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz. Dec. 3, 1917.

Mesmer and Rice presents this demand on the County of Navajo for the sum of Sixty-two hundred and four and 62/100 Dollars, balance due to complete the amount of $23,800.00 on contract, for Winslow-Colorado Bridge, together with extras herein listed, the items of which are hereunto annexed.

ITEMS OF THE FOREGOING DEMAND

Contract price	$ 23,800.00
Labor drilling holes	27.14
1958 4x reinforcing steel	137.08
Labor furnished engineer.....	31.40
	$23,995.62

LESS:		
Previous payments..	$ 17,600.00	
Rent of cement mixer	176.00	
Repairs of cement mixer	15.00	
		17,791.00
		6,204.62

Note: This demand must be signed and sworn to before some officer authorized by law to administer oaths and take acknowledgements. Orginal vouchers and receipts must be retained.

STATE OF ARIZONA, }
COUNTY OF NAVAJO, } ss.

I do solemnly swear that the above is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done a performed by me; that the items thereunto annexed are true and correct in every partcular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) LOUIS F. MESMER.

Sworn to and subscribed before me December 3, 1917.

R. S. TEEPLE,
Clerk, Board of Supervisors,
Notary Public.

My commission expires:

For value received I hereby assign this demand to:

Demand No. 1

Warrant No. 426.

Filed Dec. 3., 1917. R. S. Teeple, Clerk, Board of Supervisors.

Approved and ordered paid by WI-COLO BRIDGE FUND.

$6204.62

R. W. CRESWELL,
Chairman.

This demand called for the original contract price of $23,800.00, plus "extras" properly itemized, amounting to $195.62, less previous payments, leaving a balance of $6,204.62.

It was presented on December 3, 1917, after a protracted but ineffectual effort on the part of plaintiff and his attorney-in-fact, Popert, to move the Board to reconsider its rejection of the demand of November 5 for "extras". (Tr. Rec. p. 152, et. seq.)

It was obviously the final demand, and its acceptance constituted a final settlement as the County claims and always has claimed. (Tr. Rec. p. 46). The answer sets forth a plea of payment and of accord and satisfaction, and the same pleas are submitted in defendant's motion for judgment. (Tr. Rec. p. 102). At the time the warrant covering this demand was issued, Mesmer gave the County an agreement of indemnity against claims for labor

and material. (Tr. Rec. p. 156; testimony of Mesmer).

On May 23, 1918, Mesmer presented a new claim or demand for "extras". (Ex. 17, Tr. Rec. p. 206) which for the first time attempted to comply with the law by setting forth items of the alleged extras. This, as stated by counsel for plaintiff was filed "so that the Board of Supervisors might know the items of the November demand". (Tr. Rec. p. 134). This was filed long after the six months period of limitation had elapsed, and was objected to on that ground (Tr. Rec. 133-4).

The defendant below plead the statute of limitation in bar (Tr. Rec. p 44-103) upon the ground that this action was originally begun in equity on the 31st day of May, 1918, while the claim upon which the action is avowedly founded was finally rejected November 5, 1917; therefore, under Par. 2439, R. S. A., 1913, the action was barred, not having been brought within six months after the final rejection of the claim on November 5, 1917. Paragraph 2439 is as follows:

"A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after final action of the board, but not afterward, and if in such action lowed, on presentation of the judgment the board judgment is recovered for more than the board almust allow and pay the same, together with the

costs adjudged, but if no more is recovered than by the board allowed, the board must pay the claimant no more than was originally allowed. A claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed."

It may be proper to state at this point that no demand ever filed, excepting the demand of Dec. 3, 1917 (Ex. no. 11, Tr. Rec. 199) was sufficient to give the Board of Supervisors jurisdiction, not being itemized, and as the demand of May 23, 1918, was not filed until more than six months after the last item had accrued, it could not confer jurisdiction even if sufficiently itemized. The bridge, as finally completed, cost the county of Navajo $41,000.00, (Tr. Rec. 185) including the $15,000.00 appropriated by the Government. This is undisputed. The contract and specifications provided for certain spans (Tr. Rec. 27). These did not reach across the river, and the county was obliged to build another span and the necessary approaches, all of which expense was additional to the amount paid to Mesmer. (Tr. Rec. 186-7).

From first to last the Supervisors steadfastly refused to recognize any obligation to pay for any extras whatever except those ordered during construction by the county's inspector and amounting to $195.62 (known as the "Dubree extras" (Tr. Rec. 153-165) and the "Meritt extras" which

amounted to $1307.00 (Tr. Rec 103). The sum of $17,600.00 credited on the demand of December 3, 1917, as "previous payments" includes all payments theretofore made by the Board of Supervisors to Mesmer on this bridge, and it also shows that all of such payments were treated by both parties as applying to the contract price of $23,800.00. It is not claimed anywhere in the case or by anybody that any "extras" have ever been paid for, or that any allowance has been made or credit or recognition given by the county for any "extras" other than the extras specified in the demand of December 3, 1917, $195.62.

The contract of indemnity above referred to was admitted in evidence as Defendant's Exhibit B Tr. Rec. 88). This was also omitted by inadvertence from the printed record, through our misunderstanding. We supposed that the entire record as sent up would be printed. The praecipe will show that we requested all exhibits to be sent up, and we therefore ask that it be referred to and considered. The connecting testimony will be found on pages 162-3 of the printed transcrpt.

We think the issues cannot be more concisely stated than as set forth in our Motion for Judgment, as follows:

1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plain-

tiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435, Revised Statutes of Arizona.

2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as requred by the laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23d, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5th, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called "extras" which constitute the basis of plaintiff's claim, were, with the exception of materials of the value of $1,307.00 ordered after construction had commenced, speci-

fied and required to be furnished by plantiff on the contract itself, under the contract price of $23,800.00.

6. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agreement with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge and which were set forth in the contract, were to be paid for as "extras."

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in error, Navajo County, by its attorneys, and offers its assignment of errors.

Plaintiff in Error says that in the record and proceedings herein in the United States District Court, for the District of Arizona, there is mani-

fest error, to the great prejudice of the Plaintiff in Error, in this, to wit:

ASSIGNMENT OF ERROR NO. I

That the United States District Court for the District of Arizona erred in overruling defendant's objection to the introduction of plaintiff's Exhibit No. 1, being the call for bids of Navajo County for the construction of certain bridges, upon the ground that it was immaterial, it appearing that long after that call was made a contract was signed with full specifications and that a mere proposal for bids would have no bearing whatsoever on that contract one way or the other, no matter what it might be.

ASSIGNMENT OF ERROR NO. II

That said District Court erred in overruling defendant's objection to what purported to be a copy of an original report addressed to the Supervisors of Navajo County, and purported to be signed by Chas. E. Perkins, County Engineer, and introduced as plaintiff's Exhibit 4, for the reason that it was a copy. That no foundation had been laid for the introduction of secondary evidence. That it bore neither date or signature or was it in anywise identified as an official report. That it was irrelevant, incompetent and immaterial. That it imported no verity or authenticity. That although purporting to have been made by the County Engineer, he was not authorized to speak for, or bind, the Board of Supervisors in any way at that time.

A copy of said exhibit is attached to the Bill of exceptions (Tr. Rec. 208) and marked Plaintiff's Exhibit 4.

ASSIGNMENT OF ERROR NO. III

That the said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to Wallace Ellsworth, the Clerk of the Board of Supervisors of Navajo County, called as a witness for the plaintiff:

"MR. STONEMAN.—Under what date of the meeting of the Board of Supervisors is that minute entry made?

A. Under date of August 7, 1916.

Q. Read that into the record.

Mr. CLARK.—Now, if the Court please, we shall object to that on the ground that it is irrelevant, incompetent, and immaterial and that on its face it was a minute of the Board of Supervisors made prior to the execution of the contract between the plaintiff and defendant here and that different conditions may have been talked of or discussed or placed of [160] record prior to that time having no bearing on the contract itself and are no part of it and, therefore, ought not be admitted in evidence unless shown in the contract itself.

The COURT.—What does it purport to be?

Mr. STONEMAN.—The purport of it is that

the bid of Mesmer and Rice, being the best bid, is accepted and approved subject to the approval of the contract, specifications and plans by the United States Indian Department.

Mr. CLARK.—We think your Honor can see that it is immaterial. The contract or the bid must have been accepted or there would have been no contract and, if the latter part of this, which refers to the Indian Department, is in the contract itself, which it is not, then this might shed some light on it but, inasmuch as it is not and everything pertaining to the Indian Department was carefully stricken from the contract before signing, we say this can have no bearing.

The COURT.—Don't you put them upon proof by the allegations of your answer as to the very subject of the execution of this contract?

Mr. CLARK.—Not as to anything prior to the date of the contract itself and we confine our answer to that. There are certain allegations in the complaint as to what transpired afterwards, which, of course, are material and we have denied those in so far as we have seen proper. In any event, he would not be put to proof of any immaterial matter.

The COURT.—No. The objection is overruled.

To which ruling counsel for defendant then

and there excepted and the witness read the record in question as follows:

'A. The bid of Mesmer & Rice of Los Angeles, California, being lowest and best bid received for the construction of bridge across the Little Colorado River near Winslow at a cost of $23,800.000, the same is accepted and approved subject to approval of contract, specifications, and plans therefor by United States Indian Department, which department expects to pay one-half of the cost of construction of same bridge."

ASSIGNMENT OF ERROR NO. IV.

That the said United States District Court erred in overruling defendant's objection to the cross-examination by counsel for plaintiff of R. C. Creswell, formerly a member of the Board of Supervisors of Navajo County, and called originally by plaintiff for the purpose of cross-examination under paragraph 1680, R. S. A., 1913, [161] which paragraph reads as follows:

"A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination, at the

instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony. Such witness when so called may be examined by his own counsel, but only as to the matters testfied to on such examination."

for the reason that said witness was not then a supervisor, that he was in no official position of any kind or character and that anything he might testify to at that time should proceed under the usual rule as plaintiff's witness without tht right of cross-examination; that when the official relation has ceased one who has been an officer may be a witness only as other witnesses. That the witness was then a private citizen not bound by official sanction.

Whereupon, the following colloquy occurred:

"The COURT.—Well, the rules of evidence in the state courts do not apply in the Federal court.

Mr. STONEMAN.—No, I know that.

The COURT.—Q. During all of these proceedings, Mr. Creswell, were you a member of the Board?

A. Yes, sir. That is, during the time the contract was being let and settled up.

The COURT.—You are offering him for cross-examination?

Mr. STONEMAN.—Yes, sir. I don't want necessarily to be bound. I don't know what he is going to say. I never talked to him, being an adverse witness.

The COURT.—You are merely going to examine him as to this contract and his participation in it?

Mr. STONEMAN.—Yes, sir. [162]

The COURT.—Well, the objection will be overruled. However, you will be limited to that contract and matters that occurred before he retired from the Board.

Mr. STONEMAN.—Yes, sir.

To which ruling counsel for the defendant then and there excepted.

THEREUPON said witness testified among other things, as follows:

'Mr. STONEMAN.—Q. Mr. Creswell do you remember receiving during the month of September or perhaps October, 1916, a letter addressed to you as chairman of the Board of Supervisors by E. B. Merritt, Assistant Commissioner of Indian Affairs? A. Yes, sir.

Q. Would you recognize a copy of the letters, if you saw it? I hand you what we think is a copy of the letter and ask you if you received the original?

A. Yes, sir. I think I received the original of that, if I remember.

Q. Do you know where the original is, Mr. Creswell? A. No, sir, I do not.

Q. You left, I suppose, with the Board of Supervisors?

A. Well, I either left it there or a copy there. This was sent direct to me at Winslow.

Q. Did you communicate the contents of that letter when it was received by you to the Board of Supervisors? A Yes, sir.

Mr. STONEMAN.—We offer this in evidence now and ask that it be marked Plaintiff's Exhibit 6.

Mr. CLARK.—That has been marked plaintiff's exhibit already.

Mr. STONEMAN.—That has been marked plaintiff's exhibit for identification.

Mr. CLARK.—We object to it on the ground that it is immaterial and hearsay.

The COURT.—Q. How did you get it—through the mail? Did it come to you through the mail? A. Yes, sir.

Mr. CLARK.—Please add to that objection that it is incompetent. [163]

The COURT.—Objection is overruled.

To which ruling of the Court the defendant then and there excepted.'

THEREUPON said purported letter was admitted in evidence as Plaintiff's Exhibit No. 6, and is attached to the Bill of Exceptions (Tr.

Rec. 193) as such exhibit duly numbered for identification.

WHEREUPON said witness further testified as follows:

'Mr. STONEMAN.—Q. I hand you what purports to be a copy of a communication dated at Holbrook, August 9, 1916, addressed to the Board of Supervisors of Navajo County, purporting to be signed by Thomas F. Nichols for the State Engineer, and ask you if you ever saw the—ask you to examine this copy and state whether or not you ever saw the original of it?

A. It has been so long that I don't know whether I could recall the exact wording but he made such report I know. (Witness reads document.) As far as I know, I think it is a copy of the report from Mr. Nichols, State Engineer.

Mr. STONEMAN.—We offer this copy to which the witness has just testified and ask that it be marked as a plaintiff's exhibit with the appropriate designation.'

(Counsel for plaintiff asked counsel for defendant it they had the original of this report, and were informed that they did not.)

The copy to which the witness had just testified was then offered in evdence, to which offer counsel for defendant objected on the ground that on its face it was a report made prior to the filing of the contract. That all prior matters were deemed to be incorporated in it. That

it was immaterial, irrelevant and incompetent; that it is hearsay as it stands, without authenticity. Which objection was by the Court overruled, to which ruling the defendant then and there excepted.

THEREUPON said copy was admitted in evidence as Plaintiff's Exhibit 13, a copy of which exhibit duly numbered for identification is attached to the Bill of Exceptions [Tr. Rec. 201) and asked [164] to be read and considered as a part hereof.

THEREUPON the plaintiff offered in evidence further testimony on the part of said witness as follows:

'Mr. STONEMAN.—Q. When did you see the demand that I filed on behalf of Mesmer and Rice with reference to the time that some kind of a meeting, legal or otherwise, was held by the Board of Supervisors on or about the 23d day of May, 1918?

A. Well, I don't remember those dates at all.

Q. You remember the meeting being held, don't you?

A. I remember hearing them talk about it, yes, but I say, I don't remember being at that meeting.

Q. Who talked to you about it?

A. I think Mr. Owens did.

Q. What did Mr. Owens say?

To which question the counsel for defendant

then and there objected on the ground that it was hearsay and immaterial. His objection was by the Court sustained.'

THEREUPON the following question was propounded by counsel for plaintiff.

Q. How did Mr. Owens or Mr. Freeman happen to speak to you at all about it, do you know?

To which question counsel for defendant made the objection that it was immaterial and that it called for a conclusion. Which objection was by the Court overruled. To which ruling, defendant then and there excepted and the witness thereupon testified as follows:

'A. Well, as I remember, Mr. Owens remarked that Mr. Stoneman was over there and wanted to reopen that case of Mesmer & Rice, and they could not see any necessity of reopening it. They said they had paid them in full.

Q. How did you first acquire any information as to whatever was done at this meeting?

To which question counsel for defendant objected on the ground that it was immaterial.

WHEREUPON the following colloquy ensued: [165]

'The COURT.—He might have acquired the information from the record.

Mr. CLARK.—Then it would be more objectionable. It would be pure hearsay if he received it from a record. The record would be the evidence.

The COURT.—Do you contend that the Board of Supervisors or any other board or public body may hold a special meeting and solemnly transact business that affects the rights of individuals and fail to record it and preclude the party from proving it after they have acted upon it.

Mr. CLARK.—No, sir, and we say that nothing of this kind has been done by this Board at any time. We will make this suggestion. First, that this meeting was not a meeting of the Board of Supervisors as such. It was called as a mere conference at Mr. Stoneman's request and the telegram upon which it was based was dated the 19th day of May, 1923, and this meeting was held at his request on the 23d, only four days between the date of the telegram and the date of this meeting. Now at this meeting, your Honor, the Board of Supervisors could not legally have taken any action upon any claim to the prejudice of this plaintiff. The statutes require that every claim be presented at a regular meeting, not a special meeting. A special meeting may not be held for the purpose of considering a claim and we think counsel is aware of that and, if no action was taken at that meeting, it was because among other things, that the claim was presented to the Board for the first time then and at a specal meeting, at which they

could not legally consider it. Now, I am not saying what counsel may have understood. I am stating the situation as it is, your Honor, and we are within our rights in objecting to all of this testimony. We haven't a scrap of paper nor a word of testimony as to anything that happened that is not wide open to counsel and I think they too appreciate that. If certain things are gone, they are gone from us as well as from him.'

Which objection was by the Court overruled.

To which ruling defendant then and there excepted and the witness was then permitted to testify as follows:

A. Well, just as I stated, I think Mr. Owens told me he had been over there—that Mr. Stoneman had been over there to Holbrook and talked with him and Mr. Freeman over this claim of Mesmer & Rice.

The COURT.—Mr. Creswell, you called that special meeting, did you not?

A. I sent that telegram that I got from Mr. Stoneman to the Clerk and asked him to 'phone the other two members.

Q. Yes, and they were all present?

A. The other two were present, but I can't recall to my mind that I was there. [166]

Q. You say you were not there?

A. I don't think I was there, Judge.

Q. Do you know that you were not there?

A. No, I was not there."

ASSIGNMENT OF ERROR NO. V.

That said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to C. E. Owens, a member of the Board of Supervisors of Navajo County, who had been called originally by plaintiff for cross-examination under paragraph 1680, R. S. A., to wit:

"Mr. STONEMAN.—Q. That was the meeting at which the warrant for $6,204.00 was paid?

A. Well, I don't remember as to the date. I remember that meeting, yes.

Q. Now, the $6,204.00 was a part of the amount that has been claimed by Mesmer & Rice before December 3, wasn't it?"

upon the ground that the question called for a conclusion of the witness and that the transaction must speak for itself from the record as made.

"THEREUPON said witness was permitted to testify as follows:

A. This $6,204.62 was the final payment that was due, according to our understanding on the contract on that bridge and this was the demand that we approved and paid.

Q. Now, prior to that time, this demand of

November 5, had been presented, hadn't it, and you rejected it? A. Yes, sir.

Q. I am handing the witness Plaintiff's Exhibit 10.

(Being the demand filed by plaintiff against the defendant county on November 5, 1917, (Tr. Rec. 197).)

Now, isn't it true, Mr. Owens, that the $6,-204.65 that was finally paid to Mr. Mesmer on December 3, 1917, was intended to—by the Board of Supervisors to be a compromise and a settlement of [167] all the money that had been demanded by Mesmer & Rice in November or at any previous time?

A. No, sir, I do not understand it that way.

Q. How do you understand it?

A. I understand that $6,240.00 was the last payment due on the contract and the reason that we rejected this thing because there was no evidence there to show us where these things were placed. There is nothing attached to the demand to give us any evidence why we should pay that extra amount."

ASSIGNMENT OF ERROR NO. VI.

That the said United States District Court erred in overruling defendant's objection to the following question propounded to the said witness C. E. Owens during the cross-examination last above referred to, to wit:

"Q. But you knew that the $6,204.00 which you allowed on December 3 was included in the demand of November 5, didn't you? What was your answer?"

for the reason that it must appear, if it appears at all, from the face of the demands; that the statute requires that these demands be itemized, stating minutely what each item is for and assuming that they have followed the law, it will appear from the face of these demands whether the last one on December 3d (Tr. Rec. 199) includes any part of those theretofore presented and rejected.

Thereupon counsel for plaintiff changed the form of his question to read as follows:

"Mr. STONEMAN.—Q. Now, didn't that claim of November 5 include the amount of money which you admitted you owed him, $6,204.62?"

To which question defendant interposed the objection already made, together with the further objection that the question calls for a pure conclusion of the witness.

Thereupon the following colloquy occurred:

"M. STONEMAN.—I will change the question, Mr. Clark.

Q. Didn't you so understand on December 3 that that $6,204.62 was included in one or the other—in the demand of November 5?

Mr. CLARK.—That is already objected to. We certainly object to it. An understanding is

something so intangible [168] we can't reduce it to this record. It must appear by the face of those demands whether or not the later demand of December 3 was included in any portion of the former, and if the demands were properly made, and I am assuming that they are, they will so show one way or the other.

The COURT.—If this witness knows, why can't he testify to it?

Mr. CLARK.—He asks him to testify to an understanding which understanding must appear from the face of the demands themselves under the legal rule.

The COURT.—Well, the first question was—he asked him if it was not included and it was not part. He changed the question.

Mr. CLARK.—That is the thing that this Court should determine from an inspection of the demands themselves whether it is or not.

The COURT.—Well, I may not be able to determine.

Mr. CLARK.—Then this witness surely, we claim, would not have the right, if the demands were put in such shape that this Court could not determine it—we ought not to be bound by the fallacious conclusion, as we think it would be, of any witness.

Mr. STONEMAN. — May it please your Honor, I withdraw that question and ask him questions with regard to the claim of October 1.

Q. The amount of $6,204.00 which you paid to Mr. Mesmer on December 3, 1917, was included in the demand of October 1 or, in this case, Plaintiff's Exhibit 9, was it not?

Mr. CLARK.—That is the same question in slightly different form and we object to it upon the same grounds."

Which objection was by the Court overruled, to which ruling the counsel for defendant then and there excepted, and the witness was permitted to answer as follows:

"A. Well, whether that part of it was included in that or not, I can't say at the present time but these demands were fixed up in such a way that we as Board of Supervisors did not feel like we have a right to honor them and therefore, we reject them as they was in the whole amount.

Mr. STONEMAN.—Q. Why did you reject the demand of October 1 with the items of the different amounts claimed?

Mr. CLARK.—Well, now, we object to that.

Mr. STONEMAN.—In what respects does not—did it warrant the action of the Board of Supervisors?

Mr. CLARK.—The witness has answered that question once. [169]

The COURT.—He has asked as to November 5 but he has not as to October 1.

Mr. STONEMAN.—That claim of October 1,

as your Honor will recall, was deferred—the action on it was deferred until November.

Mr. CLARK.—Yes, that is the record. Now, in the first place, in support of our objection, we say that the witness no supervisor is bound to give a reason for the rejection of a claim; that their reason ought to appear from the claim itself and we say that it does appear plainly on the face of this demand.

The COURT.—I don't know of any rule that would preclude him from giving his reasons. If he knows why the Board acted in the way in which it did, I think he has a right to testify. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

"A. Our reasons for rejecting this demand is the same as the other. There is nothing there to satisfy the Board as to the evidence of these things that were passed on there. There isn't an O. K. there of the inspector or nothing attached to that bill where they incurred that extra expense and we could not honor a demand like that."

ASSIGNMENT OF ERROR NO. VII.

The said United States District Court erred in overruling defendant's objection to the following question propounded by the said witness, C. E.

Owens, in the course of the cross-examination last above referred to:

> "Mr. STONEMAN.—Well, you refer only to the extra expense. How about the structural steel, 147 tons at $120.00 a ton, amounting to $17,640.00? What is the objection to that?"
>
> (The item referred to in the demand of Oct. 1, 1917 (Plaintiff's Exhibit 9) is not charged for therein as an extra but as material delivered as per original contract.) (Tr. Rec. 196.)

for the reason that if there were any informality or defect in the demand it was not the fault of defendant. That if a certain number of tons of steel were charged for in that demand, before the Board could pay it there would have to be a showing by some agency or direction of the County Engineer, showing how much steel would have been required under the contract or under the proposal, so that if [170] plaintiff had furnished more that would show why demand was made for so many tons of steel.

The witness was thereupon permitted to testify as follows:

> "A. Because the demand was not itemized sufficiently and it claimed more money on there than they were entitled to and we demand an itemized demand."

ASSIGNMENT OF ERROR NO. VIII.

The said United States District Court erred

in refusing to strike from the record Plaintiff's Exhibit No. 17, being a purported demand presented by the plaintiff to the Board of Supervisors or to certain members of the Board on the 23d day of May, 1918, on the ground that the alleged statement or demand it not itemized as required by the statutes of Arizona. Secondly, that at the time it was presented there was no indebtedness of any kind or character on the part of Navajo County to this plaintiff. Third, that this claim is not sued upon or mentioned in any way in the complaint as will appear by reference to page 10 of the amended complaint where in it is stated that the demand of this plaintiff was presented on or about the 3d day of December, 1917. That there is no showing in the complaint that this demand was ever presented or filed within six months from the time the alleged claim, or any item in it, arose. Lastly, that it is irrelevant, incompetent and immaterial.

The introduction of said exhibit was thereupon allowed to stand and a copy of same is attached to the Bill of Exceptions (Tr. Rec. 206) properly marked as Plaintiff's Exhibit 17.

ASSIGNMENT OF ERROR NO. IX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to R. S. Teeple, witness called in behalf of plaintiff, to wit:

"Mr. STONEMAN.—.Q Do you remember

seeing a demand presented by Mesmer and Rice on May 17, for $17,856.00 upon which that warrant was paid and shown by what purports to [171] a carbon copy of a demand, which I hand you?

The COURT.—Is that 1917?

A. Yes, sir. I believe I recollect this, Mr. Stoneman. I can't say as to those figures.

Q. No, wasn't it upon this demand that that warrant of $10,000 was issued?

A. That is my recollection, although a new demand might have been made out.

Q. You recollect that it was this. We offer this in evidence upon the identification of it by this witness and ask that it be marked a separate exhibit."

for the reason that it is irrelevant, and incompetent and that the complaint is not based either wholly or in part upon any demand of May 17, 1917.

Thereupon Mr. Stoneman, for plaintiff, made the following explanation:

"Mr. STONEMAN.—It is offered not for the purpose of that—that purpose at all. It is offered for the purpose of showing that the Board of Supervisors has, at least in this instance, made an allowance upon—without a separate demand covering the amount allowed being presented."

Said purported demand was thereupon admitted

in evidence properly marked and numbered for identification.

ASSIGNMENT OF ERROR NO. X.

That said United States District Court erred in sustaining the motion of plaintiff to strike the following testimony of the said witness R. S. Teeple, upon defendant's cross-examination of him respecting the demand of plaintiff against Navajo County, dated December 3, 1917:

"A. Now, calling your attention, Mr. Teeple, to the line starting with the word "less" purported to be credits on this demand, opposite which is a total of $17,000.00, as I remember it?

A. Yes, sir. $17,600.00.

Q. $17,600.00 is right. Now I will ask you if that amount does not include all payments of every kind and character theretofore made by the Board of Supervisors to the plaintiff on this bridge?

A. It was so intended. [172]

Q. I am asking you if it does not?

A. It does, yes."

Upon plaintiff's objection to said question, on the ground that the witness was not qualified to answer, although it appears in the record that on December 3, 1917, the witness was the Clerk of the Board of Supervisors of Navajo County.

ASSIGNMENT OF ERROR NO. XI.

The said United States District Court erred in sustaining the motion to strike of plaintiff, certain testimony of the said witness, R. S. Teeple, as to additional work done upon the bridge in question by the County in order to complete it.

Upon the ground that it is contrary to the record made in this case, in that the record shows in this case that the plaintiff claims the payment of $6,204.00 in final acceptance and payment of all demands upon the construction of that bridge, and that it is incompetent for the purpose of disputing the record that the Supervisors did accept the bridge and finally paid for it. Said testimony being so stricken, was as follows:

> "A. On the east side, a long piling or trestle approach was constructed. On the west end, another steel span and on the west or south bank of the river piling driven in and protection work to keep it from washing, and dirt approaches also on the west end, and perhaps, some dirt on the east end. This extra steel span was built by the Omaha Structural Steel Bridge Co. and it followed the work done by Mesmer & Rice, and that work was necessary to complete the bridge so that it could be used."

ASSIGNMENT OF ERROR NO. XII.

The said United States District Court erred in overruling defendant's objection to the following

question propounded to the plaintiff, Louis F. Mesmer, while testifying in his own behalf upon direct examination, as to certain conversations alleged to have occurred about August 8, 1916, and prior to the execution of the contract in question which [173] was made on September 5, 1917, said conversation purporting to have been made with C. E. Perkins, County Engineer:

> "Mr. STONEMAN.—Now, then, what conversation, if any, led up to the ——— and what reasons were there why the payment for the additional work suggested by the County Engineer should not be included in the $23,-800.00? In other words, I mean why was it the provision put in there that the substructure should be constructed according to the *addenda* rather than that it should come out of the $23,-800.00?"

Upon the ground that it involved something that could only be determined by the Board of Supervisors, and anything that the County Engineer might have said as to that could not be binding upon the defendant at all. That it was incompetent for purpose offered or for any purpose.

ASSIGNMENT OF ERROR NO. XIII.

That said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff during the same examination last above referred to:

"Mr. STONEMAN.—At that time did Mr. Perkins say anything to you about the possibility of further charges by reason of the requirements that might be made by the representative of the Indian Department?"

Upon the ground that additional quantities required before the contract was made and signed, and particularly before any construction had started were immaterial. That they were not matters coming within what counsel calls *addenda*. For the reason that all of these things to which the witness has just testified as being additional quantities and sizes, are in terms set forth in the contract and that plaintiff was to furnish each one of these things so mentioned and which are mentioned in the report of the County Engineer and in the report of Mr. Nichols. For the further reason that the *addenda* to which counsel has referred contains this provision, which is in the contract as well as in the proposal:

"If, after construction has commenced it appears that additional quantities are required, they [174] shall be paid for as follows":

and that the contract itself provides that the *addenda* shall only become effective after construction is commenced, if it be apparent that additional quantities are required.

ASSIGNMENT OF ERROR NO. XIV.

The said United States District Court erred in

denying defendant's motion to strike the following testimony:

> "Mr. STONEMAN.—Well, what influence did it have and why was the phrase 'as per *addenda* for extras upon proposal accepted' inserted in the contract as finally signed, in so far as the substructure work was concerned?
>
> A. So that any alterations made in the substructure other than—over those that were shown on the original plans would be paid for as per unit prices shown in the *addenda.*

On the ground that the answer was a conclusion by way of interpretation of the contract which forestalls the Court in its construction. The contract being clear, plain and unambiguous.

ASSIGNMENT OF ERROR NO. XV.

That the said United States District Court erred in denying defendant's motion to strike the following testimony:

> "Mr. STONEMAN.—Was there any attempt by either of you or Mr. Perkins at that time to reach a figure as to what additional money would be required to construct the bridge according to the suggestions of the County Engineer?
>
> A. Yes, the quantities, the cubic yardage of concrete was figured, the number of extra piles was figured, the amount of reinforcing bars was figured and all of the various items that go

to make up the alterations were estimated and they were added on the contract price of $23,-800.00 an dthen that amount subtracted from the total amount of $28,000.00, to see whether those alterations from the total cost was inside of the available money for the work."

On the ground that said answer was wholly unanticipated, irrelevant, incompetent and immaterial. [175]

ASSIGNMENT OF ERROR NO. XVI.

That the said United States District Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 21, purported to be a plan showing the difference between the plans and specifications upon which the bid was submitted, and the plans and specifications upon which it was agreed the substructure should finally be built. Upon this offer the following question was propounded and the answers following said questions were given:

"Q. Are these the plans that you have testified to as showing the changes in the substructure from the plans of construction of the substructure that was included in your bid?

A. They are. They show the difference between the two river piers on the original plan as proposed and as built."

The objection was upon the ground that it did not

appear from anything the witness had stated that the offered plan is anything more than one prepared by Mr. Popert. That it does not show that the County Engineer had anythng to do with it.

Whereupon, the Court made the following observation:

> "The COURT.—No, it does not show it was submitted to him or made with his approval or changes were suggested—
>
> Mr. STONEMAN.—It is not offered for that purpose, if your Honor please. It is offered for the purpose of in a little while of forming the basis of the computation of the extra cost under the flat charges of the additional steel and concrete in place required by the changes.
>
> The COURT.—You expect to show that the work was done in accordance with these plans and changes?
>
> Mr. STONEMAN.—Yes, sir."

Thereupon counsel for defendant added to its objection that the offered exhibit would be selfserving and not under the authenticity or approval of the County Engineer or anyone else who might bind the County, and would be in the nature of hearsay as well as incompetent. [176]

Thereupon, notwithstanding said objection, said Exhibit 21 was admitted and the witness was permitted to testify fully regarding the same, and the computations based thereon.

ASSIGNMENT OF ERROR NO. XVII.

The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by plaintiff's counsel:

> "Mr. STONEMAN.—In answering the next question, I will ask you, please, always, in each instance, Mr. Mesmer, give the cost first of the construction under your own plan and specifications and then give the added cost as shown by the changes required by the County Engineer, if you can do that."

Upon the ground that in the contract there is a certain substructure definitely and specifically provided to be built by the plaintiff for Navajo County, and that the words in the contract: "substructure to be as follows: (as per *addenda* for extras upon the proposal accepted)" refer only to extras beyond the substructure that is definitely contracted to be built in the contract, no part of which is designated as an extra. That this provision as to extras has no application except to things added to the contract after actual construction shall have commenced, and that it is immaterial. Notwithstanding said objection, the witness was permitted to testify fully to comparative costs.

ASSIGNMENT OF ERROR NO. XVIII.

The said United States District Court erred in overruling defendant's objection to the following

question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

> "Mr. STONEMAN.—Q. Well, start in on the morning of that day (December 3, 1917), and tell the Court, as far as may be permitted to tell, what happened, and what was done between you and Mr. Popert and the Board of Supervisors."

On the ground that the plaintiff is precluded by the receipts, which is a final one, and by his undertaking of the [177] indemnity given on that date and by all of the circumstances surrounding this case. That the receipt constitutes, or that demand and the warrant for its payment constitutes a full and final payment of all demands.

Notwithstanding said objection, the witness was permitted to restate fully the version of what happened before the Board of Supervisors on December 3, 1917.

ASSIGNMENT OF ERROR NO. XIX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to the plaintiff, Louis F. Mesmer, by his counsel:

> "Mr. STONEMAN.—Q. Wasn't the matter being discussed between you and the Board of Supervisors, as to whether or not the Board of Supervisors, should pay the whole of the claim as it was included in the demand of November

5, or whether they should pay part of it, or whether they should stand upon their original rejection of the whole claim?"

On the ground that it was leading. Which objection was by counsel for plaintiff then and there confessed, following the comment of the Court that it was leading. Notwithstanding said objection the witness was permitted to testify as follows:

"A. The Board would only pay the amount necessary to complete the original plans and specifications, and they agreed to pay the other extras with the exception of the Nichols—or the Perkins' extras, which they would not pay, so that the money that they allowed was in—was an application of first—on the former.

Q. Well, what I want to know, what was being discussed was it a previous demand or was it?

A. Well, we were discussing the extra work involved in November—in the November discussion. All of the extra work had been completed before.

The COURT.—Q. November claim?

A. Yes, the extra work had been completed then.

Mr. STONEMAN.—Was the amount of $6,-204.62, which you finally accepted on December 3, an amount that was included in the November demand?

A. Well, part of it was, yes." [178]

ASSIGNMENT OF ERROR NO. XX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel:

> "Mr. STONEMAN.—Q. Do you know why the words, 'together with extras herein listed' was placed in there?"

(Referring to the demand of Dec. 3, 1917.) (Tr. Rec. 199.)

On the ground that it called for a conclusion and that the instrument itself is susceptible of easy interpretation.

Thereupon, the following proceedings were had:

> "Mr. STONEMAN.—The witness says that he directed that to be put in there.
>
> Mr. CLARK.—I understand that he did.
>
> The COURT.—Yes, but the instrument itself does not show why that language was used. It think it is proper evidence in explanation of the document. The objection is overruled."

To which ruling the defendant then and there excepted, and the witness was permitted to testify as follows:

> "A. Yes, the reason for that wording was to differentiate the extras mentioned and specifically enumerate here from the Merritt extras or the extras involved by reason of changes in the plans at the specific request of Mr. Merritt of the Indian Department and the ex-

tras involved by reason of the changes in the plans at the suggestion of Mr. Perkins."

ASSIGNMENT OF ERROR NO. XXI.

The said United States District Court erred in overruling defendant's objection to the following question propounded to Louis F. Mesmer, the plaintiff, by his counsel, upon redirect examination:

"Mr. STONEMAN.—Mr. Mesmer, can't you put the conditions under which you state that you were paid $6,204.00 by the Board of Supervisors on December 3, 1917—Will you please state to me again your understanding of the conditions under which that payment was made and how you accepted it?"

Upon the ground that is was not proper redirect; that it had been fully stated by this witness more than once what his understanding was in both direct and cross-examination. [179] That it called for a conclusion of the witness. That there was not any ambiguity in the contract. That it is susceptible of easy interpretation and speaks for itself.

Notwithstanding said objections the witness was thereupon permitted to testify as follows:

"A. The Board—I will give in conclusion this thing. The Board said to me as follows: 'We will give you the difference between the amount of $23,800.00 and the amounts we have already paid you, and in addition thereto, we will give you the Dubree extras and we will give you the

Merritt extras, but we won't give you the extras involved by reason of Perkins' changes' and I said: 'Gentlemen, that won't do. I will tell you what I will do. I will take the difference between the $23,800.00—'

Q. $23,000.00?

A. Yes. '—and what you have already paid me and the Dubree extras but I won't take the Merritt extras, because it will cloud the question of the Perkins' extras, which are involved with, and a part of, you might say, of the Merritt extras. It is difficult between the two lines to draw just where Merritt's and Perkins' come together."

ASSIGNMENT OF ERROR NO. XXII.

The said United States District Court erred in denying the following motion to strike made at the conclusion of the examination of the said Louis F. Mesmer, plaintiff:

"Mr. CLARK.—Before any further testimony is put on, we desire to move that all of the testimony of Mr. Mesmer as to the value of these extras claimed by him be stricken on the ground: First, that all those things that he set forth of what was required by the Indian Department are provided for in the contract itself; secondly, on the ground that no demand covering these extras, as testified to by Mr. Mesmer, was filed with the County of Navajo in the manner and form as required by the

statutes of Arizona within six months from the date of the last item."

ASSIGNMENT OF ERROR NO. XXIII.

The said United States District Court erred in overruling defendant's objection to the following question propounded by plaintiff's attorney to W. H. Popert, witness for the plaintiff:

"Mr. STONEMAN.—Could the bridge have been constructed for $23,800.00 exclusive of these modifications." [180]

upon the ground that it was immaterial.

Thereupon, after several intervening questions and some discussion the witness was permitted to, and did, answer "No."

ASSIGNMENT OF ERROR NO. XXIV.

The said United States District Court erred in overruling defendant's objection to the following question propounded to W. H. Popert, witness for the plaintiff:

"Mr. STONEMAN.—Q. Now with reference to the phrase, as it appears in the contract by Plaintiff's Exhibit 3, 'substructure to be as follows: as per *addenda* for extras upon the proposal accepted.' Do you know how that phrasing happened to be inserted, not only in this memorandum, being Defendant's Exhibit 'A,' but finally in the contract? Do you know?

Say yes or no, please. A. Yes, I know.

Q. Now, go ahead and tell the reason why."

Upon the ground that it was immaterial. Notwithstanding said objection the witness was permitted to testify as follows:

> "A. As I remember, in the original pencil draft, of which this is, I believe, a copy, we wanted to be sure that any materials to be furnished above that shown on the original blue-print and called for in the original proposal should be paid for irrespective of the description which might follow here. I can't say whether I inserted this or the Engineer or the Attorney but it was agreed upon at that time in the conference that these words should appear in the contract or words similar in effect which would be satisfactory to the County Attorney. Does that answer the question?"

ASSIGNMENT OF ERROR NO. XXV.

The said United States District Court erred in overruling defendant's objection to the following question propounded to the same witness, W. H. Popert, during his direct examination:

> "Mr. STONEMAN.—Is there any reason why it was not possible at that time to say that the bridge should be built for $23,800.00, or for any other sum?"

On the ground that it called for a conclusion.

Notwithstanding said objection the witness was permitted [181] to testify as follows:

"A. The proposal called for the construction of a particular bridge for a particular price. It was known that there would be certain modifications to be made. It was not possible to anticipate those modifications before the contract was executed. Further, the contractor beleved that it would not be legal to modify the price named in the original proposal."

ASSIGNMENT OF ERROR NO. XXVI.

The said United States District Court erred in overruling defendant's objection to the following question asked of said witness, Popert, upon his direct examination:

"Q. Was there any discussion between you and Mr. Mesmer and Mr. Perkins, the County Engineer, as to the meaning of the phrase 'substructure as per *addenda* for extras herewith'?"

On the ground that it was immaterial, that being a legal matter by which the county of Navajo could not be bound. Notwithstanding said objection the witness was permitted to testify as follows:

"A. Well, in order to save time, I will make my answer as brief as possible. The sum and substance of the discussion was that if there be any alterations—any additions to the original plan and bid that they should be paid for as provided by the proposal."

ASSIGNMENT OF ERROR NO. XXVII.

The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

> "Mr. STONEMAN.—Was there any question at that time expressed by Mr. Perkins—any claim by him that Mesmer & Rice were to construct this bridge with these changes suggested by him for the sum of $23,800.00?"

On the ground that it was leading and immaterial.

Notwithstanding said objection said witness was permitted to testify as follows:

> "A. I will say that the understanding was that whatever additional material was required to that called for in the original plan and bid would be paid for."

ASSIGNMENT OF ERROR NO. XXVIII.

The said United States District Court erred [182] in overruling defendant's objection to the following question asked of said witness, Popert, on his direct examination, by counsel for plaintiff:

> "Mr. STONEMAN.—Did Mr. Perkins say anything to you before the contract was signed as to whether or not he understood that the substructure commencing in the paragraph of Plaintiff's Exhibit 3, being the contract, where 'substructure' is used, *were* to be paid for at the unit prices, or were to be paid for as per

addenda for extras, or were to be paid for out of the flat sum of $23,800.00?"

On the ground that it called for a conclusion, that it was hearsay and immaterial. Notwithstanding said objection said witness was permitted to testify as follows:

"A. In a few words, the extra material as roughly described in contract for the substructure, extra material over that shown on the blue-print, 4183, should be paid for at the unit prices specified in the proposal. Well, I am trying to save my words and time as much as possible."

ASSIGNMENT OF ERROR NO. XXIX.

The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, on his direct examination by counsel for plaintiff:

"Mr. STONEMAN.—Have you made a calculation, Mr. Popert, of the different items of materials used in the substructure for the purpose of showing the cost of the substructure based upon prices used in the contract, under the *addenda* clause. Have you made a calculation, yes or no?

A. Yes, I have.

Q. Will you read into the record the result of that calculation.

Mr. CLARK.—Are you asking (items) unpaid for to be read into the record?

Mr. STONEMAN.—Yes."

On the ground that it was immaterial and a matter to be determined by the Court itself.

Notwithstanding said objection the witness was permitted to testify at length as to the result of his calculations. [183]

ASSIGNMENT OF ERROR NO. XXX.

The said United States District Court erred in overruling defendant's objection to the following question propounded on the 20th day of March, 1924, to the witness, Popert, on redirect examination:

"Mr. STONEMAN.—Have you made a computation for the purpose of showing the cost of the material used in the construction of the bridge under the requirements of Mr. Perkins?

A. I have.

Q. Is it itemized as to the different character of material? A. It is.

Q. Will you please give me the results of your computation?"

On the ground that it was immaterial, as the matter was already settled by the contract, and because no demand was ever presented to the Board of Supervisors within six months from the furnishing of these items.

Notwithstanding this objection the witness was permitted to testify as to the items embraced in his computation, showing a total of $13,900.00.

ASSIGNMENT OF ERROR NO. XXXI.

The said United States District Court erred in overruling defendant's objection to the following question propounded to said witness, Popert, by counsel for plaintiff:

> "So that, until those supplemental plans and specifications had been approved by the Indian Department it was not possible was it, under the contract itself, to determine what either the extent of the changes, which in this case have been called extras, or the quantity or amount of the changes?
>
> A. No, it was not possible to determine that.
>
> Q. Now, did that consideration have anything to do with the wording of this clause of the contract as it was worded, that is, that all of the preliminary specification stated in the contract were to be paid for as per *addenda* for extras upon the proposal accepted?"

Upon the ground that it was immaterial and because that very phrase, the so-called *addenda* phrase, is in the bid and proposal of this plaintiff, made long before this contract, [184] or any part of it, was ever made.

ASSIGNMENT OF ERROR NO. XXXII

The said United States District Court erred in overruling the defendant's objection to the following question propounded by counsel for plaintiff to said witness Popert:

> "Q. That November claim appears to be divided into two parts, one part according to the interpretation of the contract placed upon it by the Board and the other part according to the interpretation placed upon the contract by Mr. Mesmer. Is that true and was that intended by you to be shown?
>
> Mr. CLARK.—Are you speaking of the demand of November 5?
>
> Mr. STONEMAN.—Yes, sir.
>
> Mr. CLARK.—Well, we object. It is immaterial.
>
> The COURT.—It speaks for itself?
>
> Mr. CLARK.—The demand shows upon its face just what it is." (Ex. 10, Tr. Rec. p. 197)

Notwithstanding said objection the witness was permitted to testify as follows:

> "That is correct—If you mean that the second paragraph should be in with the first paragraph in the contractor's interpretation—the two should be added together."

ASSIGNMENT OF ERROR NO. XRXIII

The said United States District Court erred in overruling defendant's objection to the following

question propounded by counsel for plaintiff to the witness Popert:

> "Mr. STONEMAN.—Did you hear at that meeting on December 3 any member of the Board of Supervisors offer to pay any additional money to the Merritt Extras and the sum of $6,204.00?"

Upon the ground that it was immaterial and that whoever made such statement offered it as a compromise that was unaccepted, proof of which would be inadmissible in any event.

Whereupon, counsel for plaintiff stated as follows:

> "Mr. STONEMAN.—It is not for that purpose. It is for the purpose of showing that it was the November demand which was in contemplation and being considered."

Notwithstanding said objection the witness was [185] permitted to testify as follows:

> "A. Your Honor, I can save time by saying, while I don't remember the exact name, I know that the Board felt as though they wanted to pay something—they wanted to do something to have the contractor satisfied and one of the members of the Board said that he would pay a thousand dollars extra and asked if that was satisfactory to Mr. Mesmer. Does that answer your question?"

ASSIGNMENT OF ERROR NO. XXXIV

The said United States District Court erred in sustaining the objection of plaintiff to the following question propounded by counsel for defendant to said witness Popert, upon cross-examination:

> Mr. CLARK.—Did you have anything to do, Mr. Popert, with preparing or assisting in the preparation of the original bill in equity that was filed in this court by Mr. Mesmer?
>
> (No answer.)
>
> I will put it a little differently. Q. Did you have anything to do with furnishing the information to Mr. Stoneman upon which that bill in equity was drawn? Did you consult with him as to any of the information used by him in making up that complaint at all?"

Upon the ground that it was irrelevant and immaterial. To which objection, upon suggestion of the Court, counsel for the plaintiff added that it was not proper cross-examination, unless it is an attempt to impeach the witness, in which event no proper foundation is laid. Thereupon, counsel for defendant read from paragraph 4 of said bill in equity as follows:

> "Complainant avers that under the terms of such contract he entered upon the construction of such bridge but that thereafter from time to time during the performance of the labor by complainant in the construction of said bridge, defendant, through its officers and

agents, proposed to require of complainant that certain changes and alterations be made in the original specifications, which changes and alterations were not contemplated by complainant in the original specifications, proposal or contract, except in so far the expense incident to making such changes and alterations should be paid for as per the schedule to be charged for extras as set forth in said proposal, contract and specifications."

Notwithstanding the reading of said paragraph 4, the ruling on said objection was adhered to. [186]

ASSIGNMENT OF ERROR NO. XXXV

The said United States District Court erred in overruling defendant's objection to the following question propounded to R. C. Creswell, a witness in behalf of the defendant, upon his cross-examination by counsel for plaintiff:

"Mr. STONEMAN.—Did you not know that when the bridge was finally constructed by Mr. Mesmer that it was not being constructed under the proposal and the plans and specifications originally submitted to him?"

Upon the ground that the contract at that time controlled and that the contract speaks for itself as to those matters.

Notwithstanding said objection the Court then propounded said witness the following question:

"The COURT.—Did you not know at the time this bridge was being constructed that it was not being constructed under the plans and specifications as made in the proposal of Mr. Mesmer before the contract was accepted? Before the award was made. Did you not know that the bridge was not being constructed in accordance with those plans?"

Notwithstanding the objection the witness was permitted to testify as follows:

"A. Well, there was some little heavier parts but, as I understood from the Engineer at that time, it did not amount to but very little."

ASSIGNMENT OF ERROR NO. XXXVI

The said United States District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to said witness, R. C. Creswell, during the cross-examination:

"Mr. STONEMAN.—Didn't you know, Mr. Creswell, that Mr. Mesmer, in addition to the amount that he said that he would build this bridge for originally under his original proposal and specifications, would have to pay out more money for material if he built it under the specifications as recommended by Jordan—by Perkins, your county engineer?"

On the ground that that was assumed by the contractor in his contract. That it was immaterial

and a matter that was determined by the contract, which speaks for itself. [187] That it was an attempt to have this witness interpret the contract.

Notwithstanding said objection the witness was permitted to answer saying "No." That it was his understanding that they were to build a bridge for the contract price of $23,800.00.

ASSIGNMENT OF ERROR NO. XXXVII

That said United States District Court erred in denying defendant's motion for judgment filed herein and served upon counsel for plaintiff on the 21st day of May, 1924, as follows:

> "Comes now Navajo County, the defendant in the above-entitled action, and respectfully moves the Court for judgment in favor of the defendant for the following reasons:
>
> 1st. That the complaint filed herein by plaintiff, including amendments, wholly fails to state any cause of action against defendant, in that it is nowhere or in any manner alleged that the plaintiff ever presented to or filed with the Board of Supervisors of Navajo County an itemized account of his claim, duly verified as required by Paragraphs 2434 and 2435 Revised Statutes of Arizona.
>
> 2d. That the record herein shows that plaintiff has never presented any valid claim to the said Board of Supervisors, as required by the

laws of the State of Arizona, for any part of the account set out in plaintiff's complaint.

3d. That the proof in this case shows conclusively that plaintiff wholly failed to file a valid and sufficient demand within six months after the last item of the alleged claim accrued, the proof showing without dispute that the work on the bridge in question was finished in October, 1917, and the only account ever filed by plaintiff purporting to be itemized at all, was on May 23, 1918, and this account is not sued upon or referred to in any of plaintiff's pleadings.

4th. That said complaint and its amendments, together with the proof adduced at the trial, show that this action is barred by limitation, in that no suit was filed in support of plaintiff's alleged claim within six months after the final rejection thereof on November 5, 1917, the original action herein not having been filed until May 31st, 1918.

5th. Because the so-called 'extras' which constitute the basis of plaintiff's claim, were with the exception of materials of the value of $1307.00 ordered after construction had commenced, specified and required to be furnished by plaintiff on the contract itself, under the contract price of $23,800.00.

6th. Because the claim of plaintiff sued upon herein is based entirely upon an alleged agree-

ment with the Board of Supervisors of Navajo County that certain specifications and requirements respecting the substructure of the bridge [188] and which were set forth in the contract, were to be *paid* for as 'extras.'

That the proof on behalf of defendant shows that no such agreement was ever made.

That the language of the contract and the attendant circumstances show that it was never made.

That as a matter of law the Board of Supervisors could not have made such an agreement, it being in excess of its power.

7th. That the record herein shows that the plaintiff's claim has been fully satisfied and discharged.

8th. That there has been an accord and satisfaction.

Defendant has filed on this date its trial brief upon the questions involved herein, and requests that said brief be deemed and taken to be a 'memorandum of points and authorities,' in support of this action.

Dated at Phoenix, Arizona, May 21st, 1924.

THORWALD LARSON,
CLARK & CLARK,
Attorneys for Defendant."

Said motion was denied July 8, 1924 (Tr. Rec. 106) and by virtue of the judgment rendered herein on the 8th day of July, 1924, in favor of the plain-

tiff in the sum of $13,872.65 (Tr. Rec. 107), to which judgment and ruling, under and by virtue of its exception allowed, the defendant duly excepted.

ASSIGNMENT OF ERROR NO. XXXVIII

The said United States District Court erred in rendering judgment in favor of plaintiff and against the defendant, as aforesaid, for the sum of $13,872.65, on the 8th day of July, 1924, for all of the reasons and upon all the grounds set forth in the foregoing assignment of errors and defendant's motion for judgment.

WHEREFORE, by reason of the errors aforesaid, the defendant, Navajo County, prays that the judgment rendered and entered in this action be adjudged and decreed to be void; that the same be annulled and reversed, and that the said [189] District Court of the United States, District of Arizona, be directed to grant a new trial of this cause, or that this Court, because of said errors, cause a judgment to be entered in favor of the defendant.

THORWALD LARSON,
County Attorney.

E. S. CLARK,
NEIL C. CLARK,
Attorneys for Defendant. [190]

PLAINTIFF'S EXHIBIT No. 19.

DEMAND ON NAVAJO COUNTY, ARIZONA.

Holbrook, Ariz., May 7, 1917.

MESMER & RICE Presents this demand on the County of Navajo for the sum of SEVENTEEN THOUSAND EIGHT HUNDRED FIFTY-SIX and no/100 DOLLARS in payment of invoice of April 4th, for steel delivered, the items of which are heretofore annexed.

State of Arizona,
County of Navajo,—ss.

I do solemnly swear that the following is a just and true account against the County of Navajo; that the services or goods therein stated have been furnished, done and performed by me; that the items hereunto annexed are true and correct in *very* point and particular, and that no part thereof has been paid, and that I am not indebted in any manner to the County of Navajo.

(Signed) MESMER & RICE.

Subscribed and sworn to before me this 7th day of May, 1917.

_____.

My commission expires:

66

STEEL FOR LITTLE COLORADO RIVER BRIDGE, NEAR WINSLOW, ARIZONA.

Trusses	103	tons		
Joists	74	tons		
Railings	7¼	tons		
Other steel	38¼	tons		
Cylinders	13¼	tons		
Total	186	tons	@ 120	
				$22,320.00
Less hold-back of 20% as per contract				4,464.00
Amount due.				$17,856.00

Admitted and filed Mar. 18, 1924.

C. R. McFALL,
Clerk. [191]

BRIEF AND ARGUMENT.

THE CLAIMS OR DEMANDS FILED BY MESMER FOR "EXTRAS" AGAINST THE COUNTY, OCTOBER 1, AND NOVEMBER 5, 1917, WERE NOT VALID OR LEGAL CLAIMS AND WERE NOT SUFFICIENT TO GIVE THE BOARD JURISDICTION.

Under this head we group the following Assignments of Error:

VI. (Tr. Rec. 249-252-253.)

XXII. (Tr. Rec. 267.)

XXX. (Tr. Rec. 272) and

XXXVII. (Tr. Rec. 278.)

A County Board of Supervisors is not bound, nor has it the right to allow a claim against the county, unless all the items of the claim are given.

Paragraph 2434, R.S.A. 1913;

Christie v. Sonoma County, 60 Cal. 164;

Gardner v. Newayago Co., 110 Mich.; 67 N. W. 1091;

Cochise County v. Willcox, 14 Ariz. 234-236-237;

Yavapai County v. O'Neill, 3 Ariz. 363;

Santa Cruz County v. McKnight, 20 Ariz. 103;

Phillips v. County of Graham, 17 Ariz. 208-212-213;

Atchison County v. Tomlinson, 9 Kan. 167;

Ontagamie County v. Town of Greenville, 77 Wis. 165; 45 N. W. 1090;

Uzzell v. Lunney, 104 Pac. 945;

Allan v. Commissioners, 116 Pac. 175; 28 Okla. 773;

Chapman v. Wayne County, 27 W. Va. 496.

The case of Christie v. Sonoma County, 60 Cal. 164, turns on the construction of a statute almost exactly like Paragraph 2434, whch applies to claims of officers for everything except salary, as well as to claims of all others.

Since the above mentioned case was decided, California amended the statute in question by adding a paragraph to the effect that if the board do not hear or consider a claim because it is not itemized, they shall notify the claimant, and give him time to revise and reverify it. Arizona has no such statute.

County Government Act, California Statutes 1891, page 311;

Hennings General Laws of California, Volume 5, page 206, Sec. 40;

See also:

In re Pinney, 40 N. Y. S. 716;

In re White, 64 N. Y. S. 726; 51 App. Div. 175.

Brownsfield v. Houser, 49 Pac. 843.

THE CLAIM FOR EXTRAS NECESSARILY CONSTITUTES AN ACCOUNT.

If the claim in dispute had been only for all or a part of the original contract price of $23,800.00, then it might be urged with some plausibility that no complete itemizaton was necessary.

Bayne v. Board, 95 N. W. 456.

But such contenton cannot be heard under the circumstances. Here the demand is for "extras," and for nothing else. The original contract price has admittedly been satisfied in full. Extras invariably consist of items, and items make up an "account." The demand of November 5th is characterizic by plaintiff in his verification as an "account." As was said in Old Second National Bank vs. Town of Middleton, 69 N. W. 471-72:

> "The distinction between the statute of South Dakota and ours is so manifest that no discussion is needed. Not only is ours prohibitory to the extent to which we have stated, but section 690 thereof provides that any member of such auditing board who shall audit and allow any account, claim or demand so required to be itemized and verified without the same being first duly itemized and verified shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding $500.00, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. The severity of this penalty indicates how important the legislature deemed the itemizing and verifying to be. The items of an account would the more readily enable the board to detect fraud or mistake, and the verification would subject the claimant to prosecution in case of perjury. These requisites, therefore, constitute material

safeguards in behalf of the town against fraudulent or unjust claims."

It is treated as an account in the amended complaint throughout.

To be intellgently or understandingly presented under the "addenda" clause, it would have to take the form of an account. If it be suggested that the board knew, or should have known, that extras were required and what they would cost, we say it was not the duty of the Board, at least in advance of an itemized bill, to determine what extras had gone into the bridge and what they came to. Secondly, under the construction the Board placed on the contract, they had nothing to do with extras. Such a suggestion would amount to a complaint that the Board did not make out plaintiff's claim for him. If plaintiff did not himself consider this claim on "account" and our statutes make no distinction between a "claim" and an "account," why did he file a purported itemized account with the Board on May 23rd, 1918? Why does he undertake to itemize those "extras" in his amended complaint? And why did he itemize those extras that he has been paid for in his demand of December 3, 1917? Why did he and his witness testify to the cost of these extras, item by item? (Tr. Rec. 262-271.) And if this is not an account, then plaintiff is not in court, as, if not an account, he would have no right under Paragraph 2439 to

accept what was allowed him and sue for the balance claimed. We copy Par. 2439:

"2439. A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after final action of the board, but not afterward, and if in such action judgment is recovered for more than the board allowed, on presentation of the judgment the board must allow and pay the same, together with the costs adjudged, but if no more is recovered than by the board allowed, the board must pay the claimant no more than was originally allowed. A claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed."

Our research has failed to disclose a single case where extras were treated as otherwise than as items of "account". The very term imports that, and all the circumstances of this case show that anything in the way of extras was severable from the main contract, and of course, was to be listed and presented as other claims. Indeed, were the suggestion that this claim is not an account sound, there would never be any need for itemizing, it being possible in all cases for the board to find out what material had been furnished or service rendered.

THIS REQUIREMENT BEING JURISDICTIONAL, IT CANNOT BE WAIVED.

Paragraph 2434, R. S. A., 1913,

Cochise County v. Willcox, 14 Ariz. 234, at p. 237,

Santa Cruz County v. McKnight, 20 Ariz. 103, at pages 112-113.

In Cochise County v. Willcox, *supra*, (pp 237-40) the court said:

"The board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued, except as provided in Section 62 of this chapter... It follows necessarily that, if the board "must not hear or consider" a demand presented after the period of six months has passed, it has jurisdiction to make no order other than one of rejection or disallowance. In construing a similar statute, the Supreme Court of California said: "Section 40 of the County Government act of 1897 (Stats. 1897, p 470) provides that the Board of Supervisors must not allow any claim in favor of any person against the county unless upon a properly itemized and verified claim 'presented and filed with the Clerk of the Board within a year after the last item of the account or claim is accrued'. The claim of

plaintiff was filed and presented more than a year after it accrued and hence the Board not only had no power, but was expressly prohibited from allowing it. It had no power to dispense with the express mandates of the statute. Citing:

Perrin v. Honeycutt,
144 Cal. 87, 77 Pac. 776,
Murphy v. Bondshu,
2 Cal. App. 249, 83 Pac. 278,
Carroll v. Siebenthaler,
37 Cal. 196,
Thoda v. Alameda County,
52 Cal. 350

"If, therefore, the board cannot even "hear or consider" a demand not presented within the prescribed period, the limitation in Section 989 (Now 2434) is more than a "law of limitation to be made available only when specially pleaded"; it affects not only the remedy, but goes to the very right of the plaintiff to maintain any action whatever."

Clearly the Board has no jurisdiction over a claim unless itemized, and, not having jurisdiction, it can take no favorable action; much less waive the jurisdictional requirement. A Board of Supervisors is of inferior and limited jurisdiction, and nothing is presumed in support of its jurisdiction.

The defense that no itemized statement was filed by plaintiff is expressly pleaded in the substitute paragraphs filed by defendant in answer to sub-

stituted paragraphs filed by plaintiff. (Tr. Rec. 96-97-98)

But even if not pleaded at all, it is not thereby waived.

Cochise County v. Willcox,
14 Ariz. 234, and cases cited, at page 240.

If a claim not properly itemized and verified should be allowed, the allowance is void, and subject to collateral attack.

State v. Goodwin (S. C.)
59 S. E. 35

We present these authorities because the trial court held, in effect, that the Board had waived the statutory provisions here being discussed. (Tr. Rec. 167)

THE SO-CALLED DEMAND OF OCTOBER 1st, 1917, WAS FINALLY DISPOSED OF ON NOVEMBER 5th and THIS DISPOSITION BARS PLAINTIFF'S CLAIM.

All of the substructural work was completed and in place prior to October 1st, 1917, or certainly payment therefor would not have been demanded on that date. Everything designated as extras by plaintiff had accrued and was incorporated in the claim and demand of plaintiff on that date. This demand, in so far as it embraces extras, is for $13,250 (Tr. Rec. 196). The Board considered this claim on October 1st, and its only action at that time was to refer it to the county Engineer for

his report. The claim again came up for consideration November 5th, at which time it was finally rejected. (Tr. Rec. 252) The claim of October 1st for all extras in the substructure,—was therefore twice considered by the Board, and wholly and finally rejected on November 5th, 1917. There is no escape from the completeness and effect of the rejection. The cause of action of plaintiff, if he had any, then and there accrued—for all extras included in the October demand, and of course these are the same extras sought to be included *pro tanto* in the demand of November 5.

Under Paragraph 2435, Revised Statutes of Arizona, 1913, it was within the power of the Board to postpone action on the claim of October 1st, 1917, to November 5th. Under the same paragraph, the Board is required to act on all claims filed one day previous to the regular Board meeting, or for good cause, (which must appear of record), postpone the same to a future meeting. The Board, by statute, is given the power to postpone its action on a claim, *but it does not* have the power or authority to reconsider a claim that has been wholly rejected.

Paragraph 2438, Revised Statutes of Arizona.

We copy the two last-mentioned paragraphs:

"2435. No account shall be passed upon by the board unless made out as prescribed in the preceding section, and filed by the clerk at least one day prior to the session at which it is asked to be

heard. All accounts so filed shall be considered and passed upon at the next regular session, after the same are presented, unless for good cause the board shall postpone the same to a future meeting.

"2438. When the board finds that any claim presented is not payable by the county, or is not a proper county charge, it must be rejected; if they find it to be a proper county charge, but greater in amount than is justly due, the board may allow the claim in part and draw a warrant for the portion allowed, on the claimant filing his receipt in full for his account. If the claimant is unwilling to receive such amount in full payment, the claim may again be considered at the next regular succeeding session of the board, but not afterwards.

THE DEMAND OF NOVEMBER 5, 1917, IS VIRTUALLY A REPETITION OF THE OCTOBER DEMAND.

This brings us now to a consideration of the demand of November 5th. Like that of October 1, it does not even attempt ot itemize the extras. Except for the work on the superstructure, for which on extras were chargeable or claimed. (Tr. Rec. 257-271) this demand is a repetition of the demand of October 1st. It is for exactly $2750.00 more than the October demand, so far as extras are included. The demand on its face shows that it was considered by the Board of Supervisors on November 5th, and was rejected. Any contention

that action on the demand of November 5th was postponed is hopelessly at variance with the positive records, which show that it was rejected on November 5th. Even if there could legally have been a reconsideration, it could only affect that portion of the claim which pertained to work done after the October demand was filed. The demand for extras in the substructure was filed on October 1st, and rejected November 5th. The cause of action then would have had the claim been valid, and once having accrued, the statute would have commenced to run against it. On May 5, 1918, the cause of action ceased to exist, and would have been if the demands had been valid, which certainly they were not.

Coming now to the meeting of December 3rd. Not only is the record positive, but the evidence of the witnesses is most convincing, that the Board of Supervisors consistently and unalterably refused to reconsider its action on the particular demand filed on November 5th. Mr. Mesmer himself so testifies. (Tr. Rec. 157) Its action, on November 5th, rejecting the demands of that date and of October 1, was never set aside, and the Board had no power or authority to reconsider at a subsequent session, a demand that had previously been wholly rejected. The Board on December 3rd did not reaffirm its action on November, nor did it attempt to vacate or set aside its rejection of November 5th. It simply refused to recede from the positive stand

it had taken, and in that respect its attitude was no different on May 23, 1918, and is not today. All it did on December 3rd, was to allow a separate, independent and final demand of plaintiff's for $6204. It emphatically did not consider or reconsider any other. If the insignificant extras paid for on that date were included in the demand of November 5th, there is nothing to show that the Board knew it. Nothing is itemized in that demand. And even if they had known it, that fact could not have conferred jurisdiition on the Board to reconsider an illegal and extinct demand.

NO CLAIM FOR EXTRAS OF ANY KIND WAS EVER ALLOWED UNTIL THE FINAL PAYMENT ON DECEMBER 3rd, 1917.

Every dollar paid to plaintiff down to December 3rd, 1917, was a payment on the contract price of $23,800, and not a dollar was allowed on extras until that date. (Tr. Rec. 165). Indeed, the very language of plaintiff's demand of December 3rd, proves that, even if there were no other evidence. The language is "*for balance due to complete the amount of $23,800.00*, on the contract of Winslow-Colorado River Bridge, together with extras herein listed." Credit for $17,600 is given, which is every dollar that had been paid, including the $4976.00, allowed on November 5th.

It is signifciant that in the demand of November 5th, the total charge on the contract price is $17,600.

A total credit is given of $12,624. Add to this the partial payment of $4976 made on that day, and it gives exactly $17,600, the amount claimed by plaintiff to be then due on the contract price, and the exact amount credited by plaintiff on the contract price in the demand of December 3. It therefore stands established and undisputed that the only extras the board ever allowed, were those allowed on December 3rd. Every allowance prior to December 3rd, was made by the Board and accepted by the plaintiff as part payment on the contract price of $23,800.00, and not otherwise. In fact, there was never any valid or legal claim for extras of any kind or character until December 3rd. The claims of October 1st and November 5th, in so far as they purport to cover extras, were not claims at all, in a legal sense. Neither of them was sufficient, not being itemized, to give the board jurisdiction.

The demand dated November 5th was rejected November 5th, as the demand itself shows, and as a member of the Board testified. (Tr. Rec. 248) Such being the fact, any further consideration of the claim on December 3rd necessarily had to be pursuant to Paragraph 2438, and the only other statute providing for the reconsideration of claims. The claim was not open to reconsideration under the provisions of Paragraph 2438, *supra*, and the final rejection of his claim upon which this action is based therefore accrued November 5th. This is

the only possible conclusion to be drawn from the proof, and the laws of this state make it impossible for it to have been otherwise.

Facing the facts fairly, and with due consideration of the laws of the State, it is indisputable that the demand of October 1st was a claim for practically all, if not all, the alleged extras on the substructure of the bridge, and that the claim or demand was considered by the Board October 1st, and action deferred thereon to November 5th, when it was positively rejected. After this rejection, the board had no authority to further consider the claim for extras included in that demand. There is a limited period within which the Board of Supervisors may consider demands filed, and once having reached that legal limit, the authority of the Board over them ceases. The intention of the Legislature was that the Supervisors should act definitely and finally within a prescribed period. When action is finally taken, it is conclusive on all parties, including the Board of Supervisors. It avails the claimant nothing to file a new demand later for the same debt. The law has interposed a bar to further consideration of such a claim. Subsequent demands for a rejected claim do not and cannot interrupt the running of the statute.

Regardless of the multiplicity of demands filed by plaintiff, the statute commenced to run against his claim for so-called extras in the substructure, when the demand of October 1st for such extras

was rejected once and for all on November 5th. The demand of November 5th, covering the same matter was rejected the same day, but such rejection did not add to or take away from the already rejected claim.

Ignoring for the moment the statutes of Arizona prescribing the manner in which claims shall be presented and acted upon by the Board, and assuming that, contrary to these provisions, the Board has the power to approve a claim at one meeting and reject it at the next, and vice versa, and disregarding entirely the claim and demand of October 1st, which, of course, is impossible, and assuming that on December 3rd, the Board attempted to reconsider its rejection of November 5th of the November demand, and as contended by plaintiff, did then allow the November 5th demand in part and reject it in part, then the action of the Board is governed, and the plaintiff is bound, by Paragraph 2438.

UNDER PRARGRAPH 2438, ONLY CLAIMS THAT HAVE BEEN PARTIALLY ALLOWED CAN BE CONSIDERED T THE NEXT MEETING OF THE BORD. CLAIMS WHOLLY REJECTED CANNOT BE RECONSIDERED.

This paragraph distinctly provides that the only claim that can be reconsidered at the next regular meeting after being once considered, are those which have been partially allowed. It is only in

cases where a claimant is unwilling to receive the amount allowed in full payment that the claim can be again considered at the next meeting. An order wholly rejecting a claim becomes final when made, and suit must be brought on it within six months, if at all. The demand of November 5th was rejected on that date. Nothing was allowed on it then or ever afterward. It is true that an allowance of $4976.00 was made on the $23,800.00 contract price, but that was not and is not the demand in dispute. The demand here is wholly and exclusively for extras. The rejected demands of October 1st and November 5th were for extras, and for nothing else. Both of these demands severed the claim for the contract price from the claim for extras, leaving each separate and distinct. The allowance, in all cases, prior to December 3rd, were upon the contract price, and the rejections, which were always complete, were rejections of the demands for extras.

THE ACTION IS BARRED BP LIMITATION.

The demand of October 1, having been finally rejected at the next regular meeting on November 5, and this action not having been filed within six months from that date, the action is barred. (Assignment XXXVII, Tr. Rec. 279).

The plaintiff, in contending that the demand of November 5th was not finally rejected until December 3rd, overlooks the statutory restriction

above discussed, and seems to forget that even under his theory of the case, the November demand, as it stood on December 3rd, could only consist of the difference between the amount claimed for extras as therein, and the corresponding claim in the October demand, or $2750.00. That is to say, even on plaintiff's theory, the October claim could not be considered except at the November meeting, and having been finally rejected in November, the amount of it for extras could not, of course, be again considered in December. Viewing the case, then, from plaintiff's angle, the only claim over which the Board could have retained any jurisdiction on December 3rd, (not admitting that it ever had jurisdiction at all) was that portion of the demand for extras of November 5th, not included in the demand of October 1st, or $2750.00. Having lost jurisdiction over the amount included in the demand of October 1st, for extras, it is, of course, elementary that the Board could not regain jurisdiction through the plaintiff's futile expedient of filing a new demand on November 5th for the same matters that had already been rejected. The fact that the November demand was for a larger sum for extras than the October demand, does not affect the rejection of the October demand, as it is admitted that the November demand covered everything claimed for extras, including, of course, everything claimed therefor in the October demand.

PLAINTIFF HAS BEEN FULLY PAID AND HAS EXECUTED RECEIPTS AND RELEASES EFFECTING A DISCHARGE.

The receipt and release executed by plaintiff was intended, as it actually purports to be, a full and complete satisfaction of every claim and demand that plaintiff, or any one acting under him, might have or claim against Navajo County.

If any question could possibly be raised as to the completeness of this as a discharge, then let us refer to the undertaking of indemnity filed by plaintiff on December 3rd, 1917. (Dfts. Exhibit "B")

By this agreement of indemnity, (Tr. Rec. 156-161, testimony of Mesmer) the plaintiff not only fails to claim or even hint at anything being further due either for extras or otherwise, but expressly binds himself, in case a claim is made, to protect the County against it. This is a sweeping engagement, and includes all claims, including, of course, one by himself, as there is no exception. If plaintiff honestly considered that he had not been paid in full, why should he indemnify the County? If the County owed him $15,000.00, after paying him $6204.00, on December 3rd, could it have reasonably asked him for his own indemnity guaranty? The indemnity proves that both parties considered the settlement final, and this is clinched by the fact that the whole matter rested, as settled and final, for more than five months thereafter,

without a word so far as the record shows, until, seemingly as an afterthought, plaintiff appears with what he calls and claims to be an itemized demand on May 23rd, 1918.

The money that was paid to plaintiff on December 3rd, was on a demand made and filed on that day. It was separate and distinct from the demand of November 5th. It purported to be a final demand. It was paid in full and certainly constituted a distinct and irrevocable waiver of all prior demands. Taken in connection with the undertaking filed on December 3rd, it is clear that the acceptance of full payment of that demand was intended as a full settlement, and as a waiver of all other demands.

Phillips vs. County of Graham, 17 Arizona 213. In this case the court said:

> "Their demands were unliquidated, and the duty of investigation into the claims to determine if the services charged against the county were actually rendered or not was necessary under the law. In the performance of this duty the Board acted in a quasi-judicial manner, and the allowance, when accepted by the claimant, was in complete satisfaction of the claim. . . .
>
> Where a claim is unliquidated or in dispute, payment and acceptance of a less amount than claimed, is satisfaction, operates as an accord

and satisfaction, in the absence of fraud, artifice, mistake or imposition."

In Santa Cruz County vs. McKnight, 20 Ariz. 112, the Court said:

"The facts are not as though the officer had presented a demand for what he now claims as his legal salary and the board had allowed him less than his demand. . . It is a case of mutual mistake, where less is claimed than the law allowed, and where less is paid than the law allowed."

" . . . *If the demand had consisted of many items subject to inquiry and investigation; if it had been unliquidated or disputed in whole or in part— a different question would be presented; that it a question of estoppel*"

"Paragraph 2434, supra, provides that claims against the county must be presented to the board of supervisors within six months after the last item accrues, stating minutely what the claim is for, and specifying each several item and the date and amount thereof, all duly verified, and forbids the board from considering a claim not so made and verified, and not presented within six months after the accrual of the last item thereof".

It may be urged that under Paragraph 2439, Revised Statutes of Arizona, 1913, "a claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for

the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed." That is, if the claimant is dissatisfied with the amount allowed he may sue. But if he be satisfied; if he executes such release or discharge as manifests satisfaction, as the plaintiff did, he certainly loses his right to sue. The plaintiff is precluded by his conduct, his releases and his long acquiescence from now saying that he was "dissatisfied" and therefore retains his right to sue.

Chicago M. & St. P. Ry. Co. vs. Clark,
20 Sup. Ct. Rep. 924;
44 L. Ed. 1099;

Sines vs. Three States Lumber Co.
135 Fed. 1019;

Harrison vs. Henderson,
72 Pac. 875;

Where a creditor accepts a check tendered as payment in full, and retains the proceeds, there is an accord and satisfaction, notwithstanding his protest that he does not accept it in full.

Neely vs. Thompson,
75 Pac. 117;

McCormick vs. City of St. Louis,
65 S. W. 1038;

THE DEMAND OF MAY 23, 1918, IS OF NO EFFECT BECAUSE FILED TOO LATE AND BECAUSE IT DOES NOT MEET THE STATUTORY REQUIREMENTS.

Under this head we group the following Assignments of Error:

VIII (Tr. Rec. 254).

XXXVII (Tr. Rec. 279).

Not conceding, but for the sake of argument only, that the demand of May 23rd, 1918, (Tr. Rec. 206) meets the statutory requirements, then under Paragraph 2434, it was filed more than six months after the last item accrued, which was before November 5, 1917, according to the testimony of Mesmer himself, who said the extra work was completed before that month. (Tr. Rec. 150-151-157-159) The whole controversy is limited to the changes in the substructure. No one claims that this was not completed before November. It is clear that no legal demand was filed within six months.

These circumstances also show conclusively that no suit was filed within six months after the final rejection of the demand on November 5th. Suit was not filed until May 31st, 1918. The claim itself is barred because no itemized account was filed within six months after the last item accrued, and the action is barred because not filed within six months after final rejection of the claim. It makes no difference whether the demand of November 5

was finally rejected then or on December 3, as it never afforded the Board jurisdiction.

THE BOARD OF SUPERVISORS WILL NOT BE DEEMED TO HAVE INTENDED TO DO MORE THAN THE LAW ALLOWED THEM TO DO.

(Assignment XXXVII, Tr. Rec. 280)

The court admitted, over the objection, evidence of conversations between the parties and their representatives prior to the date of the contract, on the theory that it tended to show the intention of the parties. It was then, and is now, our view that this was immaterial in so far as the intention of the Supervisors was concerned. That is, their intentions, as officers of the county, must be presumed to extend only to the things the law permits them to do. It is familiar rule that the law relating them to do. It is a familiar rule that the law relating to a contract is a part of the contract itself.

> "The law of the place where the contract is entered into at the time of the making of the same is as much a part of the contract as though it were expressed or referred to therein".
>
> 13 C. J. 560, Par (523)—3.
>
> "Statutes in force at the time a contract is made by a municipality enters into and become a part of a contract. Its obligation is to be measured and performance is to be regu-

lated by the terms and rules which they prescribe."

Cincinnati vs. Public Utility Commission,
3 A. L. R. 705, 98 State, 320;
121 N. E. 688; See also 6 R. C. L. 325.

"Agreements in violation of positive law are those which are expressly or impliedly prohibited either by some rule of the common law or by some express statutory provision."

13 C. J. 411-(341-2)

The plaintiff was bound to inform himself, and from the foregoing, it is fairly reasonable to suppose that he had informed himself as to the power or lack of power of the Board of Supervisors, after having accepted a bid for a particular type of bridge, to increase the expenditure for said bridge to an amount more than $15,000.00, in excess of the amount available therefor under the bond issue, to-wit; $28,500.00, without competitive bidding. It was the duty of the contractor to inform himself that the statutes of Arizona provide, among other things, that the Board of Supervisors may not purchase materials in excess of $100.00 valuation without advertisement and competitive bidding; that he inform himself of the provisions of Paragraph 2431 of the Civil code of Arizona to this effect:

"The Board must not for any purpose contract debts or liabilities except in pursuance of law or

ordinances of its own adopting, in accordance with the powers herein conferred".

"The power of such a board to bind the city depends on express grant, and a person dealing with it is bound to take notice of the limits of its authority."

28 Cyc. 1024, notes 41-42.

"No judgment can be rendered upon an account based upon an obligation prohibited by the Harrison Act".

McRae vs. County of Cochise,
5 Ariz. 26.

"A contractor dealing with a municipal corporation is chargeable with knowledge of the limitations on the power of its agents and officers."

Contra Costs Construction Company vs. Daly City, 192 Pac. 178

"A person contracting with public officers must take notice of their powers and is charged with a knowledge of the law, and makes a contract in violation of the law at his own risk, and where public officers fail to advertise and contract with the lowest bidder, a contract so made is wholly void and imposes no obligation upon the public body."

Reese vs. Ultra Vires, Paragraph 190

"The plaintiff is chargeable with knowledge that the Fire Commissioners in employing him,

had no authority to bind the defendant, and the City cannot be held liable for the services rendered even if beneficial to it".

Douglas vs. Lowell, 194 Mass. 268; 80 N. E. 510;

Higginson vs. Fall River, 226 Mass. 423; 115 N. E. 764; 2 A. L. R. 1211;

THE PLAINTIFF COULD NOT ALTER HIS BID AFTER THE CONTRACT WAS AWARDED.

In the case of City of Chicago vs. Mohr, the contractor Mohr, was permitted to alter his bid, such bid having been submitted after due advertisement and submission of bids in competition with other bidders. The Supreme Court of Illinois said:

"It is a clear violation of the law to permit the change in the bid of the Freeman Company as to the matter of time. That it is obvious to allow the change of the bid in any material respect after the bids are opened is a clear violation of the purpose, intent and spirit of the law, and opens the door for preferences and favoritism as between the different bidders, if not to the grossest frauds. When a bid is permitted to be changed it is no longer the sealed bid submitted in the first instance, and to say the least is favoritism if not a fraud, a direct violation of the law and cannot be too strongly condemned".

216 I.. 320; 74 N. E. 1056.

And upon this point that court cites the following in support of its position:

State vs. Board of Commissioners, 11 Neb. 484; 9 N. W. 691;

Beaver vs. Trustees, 190 Ohio State 97;

Boren vs. Commissioners, 21 Ohio State, 311

The attention of the court is also invited to the case of Fairbanks Morse & Co. vs. City of North Bend, 94 N. W. 537. In this case, a bid was submitted by Fairbanks Morse & Co. and along with other bids, for furnishing certain machinery. Thereafter, and within a day or two, the same company submitted a new bid by which they modified their bid so as to furnish different machinery, but for the same amount of money. Upon the situation thus presented, the court said:

> "It will be conceded, we think that a valid contract of the character mentioned can be made by the City only after it has advertised for bids, and then only with some person in accordance with the bids tendered by him in response to such advertisement".
>
> Citing numerous cases in support of this principle.

In the case of Ely vs. Grand Rapids, 44 N. W. 447, a change in the contract was attempted by the

City Council of Grand Rapids after having entered into a contract with one Ely for the construction of a certain amount of paving, by permitting the contractor Ely to perform an additional amount of paving at the same rate as the original contract. Of this the court said:

> "It is true that the paving of gutters was within the scope of improvement, but this didn't confer upon the defendant the right to dispense with the charter requirements for competitive bids."
>
> Citing McBrien vs. Grand Rapids, 56 Mich. 95; 22 N. W. 206.

In Clinton Construction Company of California vs. Clay, 34 Cal. App. 525; 168 Pac. 588, the court held:

> "A Board of Education cannot contract for work not provided for under original contract exceeding $500.00, without complying with section 130, requiring letting contracts to lowest bidder after public notice".

Indeed the plaintiff himself did not think he could lawfully vary his bid. (Tr. Rec. 170—testimony of W. H. Popert.)

In L. R. A. (N. S.) vol. 38, p. 660, note 8, is the following:

> "Generally public officers have no authority to make or allow material or substantial changes in any of the terms of the proposed contract after the bids are in. Such a course

would prevent real competition and lead to favoritism and fraud".

Citing numerous cases.

"The specifications cannot lawfully be altered after the bids have been made without a new advertisement giving all bidders an opportunity to bid under the new conditions. The municipal authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited".

19 R. C. L.—Par. 357.

"Where public interests are affected by a contract, the construction placed upon it by the parties is not controlling".

13 C. J. 550-note 72.

This, it would seem is especially true where the contract is severable—that is, one part upon a contract to build a bridge of certain specifications for a definite price, and a claim is made, as in this case, for a different and heavier bridge, the excess sought to be recovered separately as "extras".

13 C. J. 563.

And in such case, where the general public is affected by a violation of a particular statute, or the provisions of any public law, it is not necessarily essential to plead the illegality of a contract constituting such a violation.

Dunham vs. Hastings Pavement Co.,
67 N. Y. S. 632;
Kearns vs. New York, etc., Ferry Co.,
42 N. Y. S. 771;
Dealey vs. San Mateo Land Co.,
130 Pac. 1066-68;
Vol. 19 R. C. L. Par. 352 has the following:

"When a contract is entered into in violation of a positive rule of law intended for the protection of the taxpayers, such as a requirement that contracts of a certain character shall be given to the lowest bidder, or that the incurrence of an obligation of a certain magnitude shall have the approval of the voters of the municipality, there can be no recovery either upon the contract itself or upon a quantum meruit".

It appears from the record that the bridge in question was built with the proceeds of bonds issued and sold by the county of Navajo for the purpose of building this bridge and other bridges. (Tr. Rec. 68-71-283-290) It is in evidence and not disputed that the amount allotted for the building of this bridge T—3, was about $28,600.00. (Tr. Rec. 144) and that this was the amount of county money the electors of Navajo County authorized the Supervisors to expend upon it in the election proceedings.

There was no statutory authority for the Board after awarding a contract upon competitive bid-

ding for the building of a bridge at a stated price, to then contract for different construction of the same bridge without competitive bidding, under the guise of "extras", more particularly when the supposed "extras" amount to the unparalled proportion of nearly three-fourths of the original contract price. If it should be established in this case that the Board could make so improvident an arrangement, a dangerous power would be placed in its hands. If a Board can do what plaintiff seeks to enforce upon it in this case, it can let a contract for a $10,000.00 bridge, and then, under the subterfuge of "extras", make the same bridge cost $100,000.00.

There were, moreover, many statutory provisions in force in Arizona in 1916, which denied, expressly or impliedly, any such power. Boards of Supervisors exercise inferior and limited jurisdiction. They can do only those things which by express provision or necessary implication, they are permitted to do.

Hammer vs. Smith,
11 Ariz. 420.

County of Santa Cruz vs. Barnes,
9 Ariz. 42.

The Board of Supervisors of a county may make certain contracts for the county, but the county is the contracting party, and the Board is the mere agency through which the county acts.

Gannon vs. Hohnsen,

14 Ariz. 523.

Paragraph 2421 Revised Statutes, 1913, page 850, reads as follows:

> "All books, stationery and supplies for county institutions for the ensuing year, and all erections of, repairs to and alterations in any county building exceeding in value the sum of One Hundred Dollars, shall be let by contract, after advertisement made for bids therefor for not less than ten days nor more than four weeks in the official paper of the county. Such advertisements shall state that sealed bids will be received at the office of the board of supervisors until a date therein named, and shall state generally the nature of the bids, and that specifications therefor may be seen at the office of said board, or, it may call for specifications and bids. The board shall let the contract to the lowest bidder, or may reject all bids and readvertise".

It may be urged that this provision does not apply to bridges. We think, however, that the paragraph is intended as a general declaration of policy, and that it was intended to apply to any structure the county might build, in which the value exceeded one hundred dollars. This view is fortified by Paragraph 5124, which reads as follows:

> "Upon the adoption by the board of control or the board of supervisors, under whose direction the work is to be done, of the plans and

specifications for the construction of any state highway or bridge, or extensions thereof, it shall be optional with the board of control or board of supervisors, as the case may be, to have any or all work provided for by this act done either by contract or under a wage system. In case the work is to be done by contract, it shall be the duty of the said board of control, or board of supervisors, to advertise in a newspaper published in such county, where the proposed work is located, for sealed proposals for the doing of such work. Such notice shall be given for at least thirty days prior to the opening of such sealed proposals, which shall be directed to the said board of control, or the board of supervisors, as the case may be, and marked "State Highway Contract". Upon the opening of such proposals, the contract for the work shall be let to the lowest responsible bidder, provided, however, that the said board of control, or board of supervisors, shall have the right to reject any or all bids and may proceed to construct said work under their own supervision, without contract. In case the contract is awarded, as herein provided, the successful bidder shall enter into such a contract with the State of Arizona, or the county in which the work is to be done, as may be prescribed by the said board of control or the board of supervisors, a copy of which contract

shall accompany the plans and specifications. The successful bidder shall also file with the said board of control or the board of supervisors, a good and sufficient bond, payable to the State of Arizona, or to the county, in a sum not less than twenty-five per cent of the contract price of said work, conditioned upon the faithful performance of said contract."

Where bonds are issued, as is the case here, the board can only proceed as provided by Paragraph 5282:

"If any bonds or other evidences of indebtedness shall be issued and sold by any county, school district, city, town, or other municipal corporation, under the provisions of this chapter, for the purpose of erecting and furnishing any public building within such county, school district, city, town or other municipal corporation, the board of supervisors, in event such public building shall be erected and furnished by the county or school district, and the city or town council in the event such public building is to be erected and furnished by a city, town or other municipal corporation, shall, within the period which it is required under the provisions of the preceding section of this chapter prepare and adopt a form of bond or other evidences of indebtedness, adopt plans and specifications for such building, and said board of supervisors, city or town council, as the case

may be, shall, as soon as may be practicable after the adoption of such plans and specifications, advertise for bids for the erection and furnishing of said buildings."

"The notice of advertisement for such bids shall set a day and hour, not less than forty days from the date of such notice, when said bids shall be received and opened, and said board of supervisors; city or town council, as the case may be, shall award the contract for the erection and furnishing or the erection or furnishing of said building to the lowest and best responsible bidder, provided that any and all bids so submitted may be rejected. In the event any bid shall be accepted, said board of supervisors, city or town council, as the case may be, shall require the person or persons to whom such award or contract has been let, to enter into a written contract with said board of supervisors, city or town council, as the case may be, for the erection and completion of said building and the furnishing thereof, and shall require such person or persons entering into such contract to give bonds to said county, city or town, for the amount of the contract, with two or more sufficient sureties, or give a surety company bond in a like manner, conditioned upon the faithful performance of the contract, such bond to be approved by the board

of supervisors, city or town council, as the case may be.

While this paragraph does not expressly apply to bridges, it is made to do so by the proviso in Paragraph 5285, which is a part of the same chapter as Paragraph 5282.

If it be claimed that the county ratified the alleged agreement, then the authorities are practically universal that the board of supervisors could not ratify a contract which they had no right in the first instance to make. This is a corrollary to the general proposition set forth above.

Such a contract cannot be ratified. 19 R. C. L. Paragraph 360 reads in part as follows:

> "It is clear that the attempted ratification by a municipal corporation of a contract which it has no power to enter into is ineffectual, and cannot render the contract a binding obligation."

In addition to the presumption that the supervisors could not have intended to do that which exceeded their authority, we have their positive testimony (Tr. Rec. 157-165-175-187) that no such intention existed, and no such agreement was ever considered. In the light of these circumstances, the construction claimed by plaintiff cannot be sustained.

THE SPECIFICATIONS AS TO SUBSTRUCTURE IN THE CONTRACT AMOUNT MERELY TO A DESCRIPTION OF THE SUBSTRUCTURE AS FINALLY AGREED UPON, AND THE WORDS "AS PER ADDENDA FOR EXTRAS UPON THE PROPOSAL ACCEPTED" REFER ONLY TO CHANGES ORDERED BY THE INDIAN OFFICE OF OTHERWISE, AFTER CONSTRUCTION HAD COMMENCED.

This is raised in Assignments XII and XIII.

It is so obvious that this is true that argument seems unnecessary. The very language signifies this, and nothing more. Reference is made to the addenda clause, and the plaintiff relies upon it. That being so, he must accept all of it, or none. He may not select that part of it which is advantageous to him, and reject that part of it which is advantageous to the defendant. Plaintiff would have the court ignore the opening sentence of the addenda clause "If, *after construction has commenced*, it becomes apparent that additional quantities are required, etc., and consider only the prices at which the extras were to be furnished. The unfairness of this is plain. There is not a word in the entire contract that to our minds even implies that any part of the structure as described in the contract was to be paid for on the basis of extras. It is hardly conceivable that the supervisors entertained such an idea, or that they would have

signed the contract if they had. If the plaintiff had ever told them—of which there is not a word of evidence—that he would charge the county about $15,000.00 for the change in the substructure, is it reasonable to think they would have entertained it for a moment? They certainly would not—they would have called for new bids. If, indeed, plaintiff had ever been fair enough to tell the board what he designed to charge for this change in the substructure at any time between September, 1916, and when he commenced work, he would not have been permitted to start. He says he told the County Engineer. (Tr. Rec. 260) That is not enough. The plaintiff testified that early in August, 1916, he had not only made a revised plan of the bridge for his own information, but had figured out the extra material required, and he did not even submit this plan to the Board. (Tr. Rec. 261) Fairness would demand that the board should have been informed in some way that the contractor not only intended to charge additionally for the change in the substructure, but that he intended to charge for it on the exorbitant addenda basis. The State Engineer so states (Tr. Rec. 203) They were not so informed. If the board entertained the intent to tolerate a wrong so gross as this, they would have been guilty of a fraud upon the county they represented in a fiduciary capacity. It is incredible that the board could have intended such a wrong.

Again, it must be remembered that the contract

itself defines extras as "additional quantities required after construction had commenced." Under that clause, nothing specified in the contract itself could be deemed an extra.

The contract itself, together with the specifications, make it clear that the contractor bound himself to build the bridge as described in the contract for $23,800.00, including the substructure. On the first page of the contract, we find this binding provision:

> "Whereas, the said party of the second part has agreed, and by these presents does agree, to construct and build the bridge *hereinafter described*, for the sum of Twenty-Three Thousand Eight Hundred and no/100 ($23,800.00) Dollars,
>
> "Now, Therefore, the said party of the second part has agreed, and by these presents does agree, to and with the party of the first part, for and in consideration of Twenty-Three Thousand Eight Hundred and no/100 ($23,800.00) Dollars, to furnish all the materials and labor therefor, and in an efficient and workmanlike manner, and according to the plans and specifications designed and attached hereto, and made a part hereof, *to construct and erect the following bridge*, upon the site herein named, to-wit:
>
> "Bridge T-3: Over the Little Colorado River east of Winslow".

This is followed by a description of the bridge as actually built, excepting the slight changes thereafter made by Mr. Merritt, of the Indian Office. After this is the provision for extras, which limits extras to those things which might be required after the making of the contract.

> "It is further agreed that in the event of any changes being made by the party of the first part, or any extra required by the party of the first part, such changes or extras shall be made or furnished at prices designated in proposals hereto attached and made a part hereof".

The contract provides, (p. 2) that all payments were to be made from the bridge bond fund, in the manner prescribed by law. Plaintiff knew that the bridge fund was limited to $28,000.00; so far as this bridge was concerned. Plaintiff also knew, as did all parties concerned, as testified by Mr. Creswell, that the Omaha Structural Steel Company was paid about $15,000.00 for completing the final bents or spans in the bridge, and that this balanced the appropriation made by the Government.

Therefore, the contract and specifications and all the attendant circumstances being fairly considered, the intent of the Board that there should be no charge for extras save those arising after the making of the contract, is clear. This is further manifested by the attitude of the Board from first to last, to recognize no claim for extras, save as above stated.

Did the Board of Supervisors have any legal authority to anticipate the possible contribution of the Indian Office to the cost of this bridge? This was purely contingent at the time said contract was signed. No reference is made in the contract to such contingency; it is manifest that the contract made and executed was to be paid out of bond money voted by the people of Navajo county which appropriated the amount of $28,500.00 to the building of the said bridge "T-3". That, and that alone was the only legal source from which payment could be made. This was undoubtedly well known to the plaintiff, and as we have seen from the action and conduct of the Board of Supervisors themselves, they had no notion that the phrase "As per addenda for extras", hidden by a parenthesis in a paragraph devoted to giving specifications as to steel and the dimensions of the steel, the size of the piers and cylinders and other parts of the substructure of said bridge, could or would be construed so as to bind the County for Fifteen Thousand Dollars in excess of the contract fixed in the contract as the cost of said bridge. Now can it be said that the Board of Supervisors and the contractor jointly and contemporaneously intended by the execution of that contract to bind the county to, nearly fifteen thousand dollars in the form of extras, over and above the original cost of the bridge of $23,800.00, when there was no fund with which to pay that amount? When the people of Navajo County had

voted $28,500.00 for that bridge, and no more, and when they knew that they had to build an extra span, as well as approaches to the bridge, can it fairly be said that the Board of Supervisors and the contractor jointly and deliberately intended, in the execution of that contract, to run up the expense of that bridge to nearly sixty thousand dollars, well knowing that they were without legal authority to do so?

Can it now be said that in equity and good conscience, or according to the strict rules of the law, that the plaintiff has anything of which to complain? He was a man of considerable experience as a contractor and in the habit of dealing with municipalities in large figures. He was presumed to know the authority of the officers with whom he dealt and he had for years been in the habit of dealing in matters involving large sums of money with such officers. May it not be assumed that he did actually know what the limitations of their authority were? May it not be assumed that he had efficient and faithful counsel who kept him advised in regard to each particular contract before its execution? If so, the plaintiff is here taking advantage of a "joker" which was inserted in that contract and permitted to remain there through the ignorance or neglect of those who were under the duty of advising the Board of Supervisors in regard to the terms of the contract.

ASSIGNMENTS COVERING OBJECTIONS TO AND MOTIONS TO STRIKE TESTIMONY.

Assignment VIII. This relates to the denial of defendants' motion to strike Plaintiff's Exhibit No. 21, being the purported claim presented May 23, 1918. (Tr. Rec. 254) The reasons given for the motion were (1) that it was not properly itemized; (2) that on that date the county was not indebted to plaintiff; (3) that the claim is not sued on; (4) that it was not presented within six months from the time the alleged claim, or any item in it arose; (5) that it is irrelevant, incompetent and immaterial.

We have already shown that all the extra work was completed before November 1, 1917. This claim purports to embrace all the extras sued for and was filed "so that the Board could know the items of the November demand". This claim is the only one ever filed that even attempts to itemize the extras in suit, and as it was filed long after the time limited for filing had expired it should have been stricken on that ground alone.

Assignment X. This relates to the striking out of the testimony of R. S. Teeple, who was clerk of the Board of Supervisors during the time the contract for the building of the bridge in question was being worked out. He had testified that the credit of $17,600 appearing on the demand of December 3 included every dollar that had theretofore been paid to plaintiff by the county. This was im-

portant, showing that the Board had never made any allowance for extras. (Tr. Rec. 256) Yet the Court struck it out on the singular ground that the witness was not qualified to answer.

Assignment XI. The Court also struck his testimony as to the additional work the County had to do to complete the bridge after plaintiff had finished his contract. This was material as showing that the $15,000.00 appropriated by the government was expended on this bridge in addition to all that was paid plaintiff. (Tr. Rec. 257)

Assignments XII and XIII. These relate to certain conversations which plaintiff said he had had with the County Engineer. (Tr. Rec. 257-8) It was thus sought to bind the County as to a vital part of the contract. It was not shown that anyone authorized to speak for the County even knew of these conversations.

Assignment XVI relates to the Court's refusal to strike the plaintiffs' conclusion as to the reason why the "addenda" clause was placed in the contract. (Tr. Rec. 259)

Assignment XV relates to the refusal of the court to strike the alleged figuring of extra quantities and costs by plaintiff with the County Engineer, with no showing that such figures were ever brought to the notice of the Board. (Tr. Rec. 260)

Assignment XVI relates to the overruling of defendant's objection to Plaintiff's Exhibit 21, a plan showing the difference between the original

proposal and the plan upon which it was agreed the substructure should be built. Admittedly this exhibit was never submitted to the County Engineer. (Tr. Rec. 260-261)

Assignment XVII relates to the overruling of defendant's objection to plaintiff's detailed statement of the alleged extras, with costs. (Tr. Rec. 262).

Assignment XX relates to the overruling of defendants' objection to the plaintiff's conclusion as to why the words "together with extras herein listed" were placed in the demand of December 3, 1917. (Tr. Rec. 265)

Assignment XXII relates to the denial of defendant's motion to strike plaintiff's testimony as to the items and cost of the alleged extras, upon the ground, among others, that no demand in manner and form required by law covering these extras, was filed within six months from the date of the last item. (Tr. Rec. 267)

Assignment XXIV goes to the overruling of defendant's objection to an explanation of how the "addenda" clause happened to be inserted in the contract. (Tr. Rec. 268)

Assignment XXVI relates to another discussion between plaintiff and the County Engineer, as to the meaning of the "addenda" clause, to which the defendant objected as immaterial, and as a matter by which the county could not be bound. (Tr. Rec. 269).

Assignment XXVII goes to the same matter. (Tr. Rec. 270)

Assignment XXVIII relates to the overruling of defendant's objection to a question asked of plaintiff which plainly called for hearsay as to the County Engineer's understanding of the "addenda" clause. (Tr. Rec. 270-1)

Assignments XXIX and XXX relate to similar questions asked of Witness Popert (Tr. Rec. 272) and similar objections thereto and rulings thereon as are covered in Assignments XVII and XXII.

The assignments not specifically discussed or referred to in the foregoing brief do not, in our judgment, require detailed attention. The questions raised by them have been covered as fully as we think ncessary in the related points herein developed at some length.

For the reasons stated herein, we do not believe the judgment of the trial court can possibly stand, and respectfully submit that it should be reversed or that this court render judgment in favor of the plaintiff in error.

Respectfully submitted,

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in Error.

No. 4412.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Navajo County,
Plaintiff in Error,

vs.

Louis F. Mesmer, an Individual, Doing Business Under the Firm Name and Style of Mesmer & Rice,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

The Errors Assigned May Not Competently Be Inquired Into.

May it please the court:

Upon the record presented in this court, as appears from the transcript of record in the particulars hereinafter referred to, it is suggested that the errors assigned may not competently be inquired into in that it appears, to quote the language used by this court in the case of Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 Fed. 310:

> "The writ of error in this case brings up for review a judgment in an action at law tried to the court without a jury, the judgment being based upon a general finding upon the evidence in favor of defendant (plaintiff) in the court below, the defendant in error here. A jury was dispensed with by consent of the parties expressed orally in open court, but no stipulation in writing evidencing the waiver was had or filed, and the assignments of error are all based upon rulings had at the trial."

It appears from the record:

(a) A jury was dispensed with by consent of the parties expressed orally in open court. [Tr. of R. pp. 83, 84, 107, 110.]

(b) The judgment was based upon a general finding upon the evidence in favor of plaintiff in the court below, the defendant in error here; no special findings were asked. [Tr. of R. pp. 191, 218.]

(c) The sufficiency of the amended complaint upon which this action was tried was not called in question by motion, demurrer or other procedure, nor even by answer thereto, nor did plaintiff in error, as defendant in the court below, elect to have its demurrer to the first complaint stand as demurrer to the amended complaint, in compliance with Rule 16, Rules of Practice of the District Court of Arizona, which reads as lollows:

> "Any party to an action at law or suit in equity, whose pleading is demurred to, may, as of course, at any time before the demurrer is heard, amend

such pleading, in the respects pointed out by the demurrer, or in any respect, without any order therefor; and the pleading so amended shall supersede and take the place of the pleading to which the demurrer was taken. The demurring party may put in a demurrer to the pleading as amended, or he may serve and file a notice that he elects to have his demurrer on file stand as a demurrer to the new pleading, in which case it shall be deemed and treated as such demurrer; or he may proceed with the cause without further demurrer."

First complaint in law. [Tr. of R. pp. 24-40, incl.] Motion to strike, plea in bar, demurrer, answer and motion to make definite and certain all as to first complaint. [Tr. of R. pp. 41-60, incl.] Amended complaint. [Tr. of R. pp. 62-80, incl.] No answer to amended complaint.

(d) The trial court had jurisdiction of the subject matter and parties and process was regularly issued and served and defendant in court below appeared and defended. [Tr. of R. pp. 21, 22, 23.]

(e) Judgment was regularly entered during term, no special findings having been asked. [Tr. of R. pp. 107, 191.]

(f) Motion for judgment. [Tr. of R. p. 104.]

Cannot take the place of request for special findings even though contents were sufficient, because not filed during the trial and before case was closed and submitted to trial court. Trial closed March 21, 1924. [Tr. of R. p. 95.]

Motion for judgment filed May 21, 1924. [Tr. of R. pp. 104 and 280.]

(g) In addition to the foregoing, it may be added that except as it may be determined to be an exercise of the discretionary power of the trial court, the granting of an extension of time for filing bill of exceptions is in contravention of Rule of Practice No. 82 of the District Court of Arizona, and by this rule upon the state of the record is null and void. The rule is as follows:

> "When an act to be done in any action at law or suit in equity which may at any time be pending in this court, relates to the pleadings in the cause, or the undertakings or bonds to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the giving of notices of motion, the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time; but no such extension or extensions shall exceed thirty days in all, without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for thirty days by stipulation of the adverse party; and any extention by previous stipulation or order shall be deducted from the thirty days provided for by this rule. It shall be the duty of every party, attorney, solicitor or counsel, or other person applying to the court or judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have previously been ob-

tained from the adverse party or granted by the court or judge; and any extension obtained from the court or judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party. Nothing herein contained shall interfere with the power of the court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party."

Authorities in Support.

As to the procedure governing cases tried by the court without the intervention of a jury, under the provisions of section 700, R. S. U. S., as was expressed by the Circuit Court of Appeals of the 8th Circuit, Mason v. United States, 219 Fed. 547:

> "Section 700, Rev. Stat. U. S., provides as to what rulings in a case tried to a court, without a jury, may be reviewed by this court. This court has, with what might seem to be tiresome repetition, established rules for the guidance of counsel as to how these questions may be preserved and reviewed. Experience teaches that it would serve no useful purpose to repeat these rulings."

The rule having been established and because it would serve no useful purpose to set forth in this brief the hundreds of cases decided upon the rule as collected in the notes following section 700, appearing in Vol. 6, Fed. Stat. Ann., 2d Ed., p. 205 *et seq.*, defendant in error contents himself with citation only to the cases in which the question has arisen for de-

termination in this circuit and one or two other circuits.

In the case of *Erkel v. U. S.*, the opinion being written by Judge Gilbert, it was held:

> "Those sections (649 and 700, U. S. Comp. St. 1901, pp. 525, 570) provide that issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, that the finding of the court on the facts shall have the same effect as the verdict of a jury, and that, where a case is so tried, the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by bill of exceptions, may be reviewed on writ of error, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. Under that statute it has been uniformly held that if a case is tried before the court without a jury, and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an appellate court on writs of error. Citing Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395; County of Madison v. Warren, 106 U. S. 622, 27 L. Ed. 311; Bond v. Dustin, 12 U. S. 604, 28 L. Ed. 835; Branch *et al.* v. Texas Lumber Co., 4 C. C. A. 52, 53 Fed. 849; Merrill v. Floyd, 3 C. C. A. 494, 53 Fed. 173; Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158; Ham v. Edgell, 45 C. C. A. 661, 106 Fed. 820; City of Defiance v. Schmidt, 59 C. C. A. 159, 123 Fed. 1."

In this case it was also decided that the rule of practice in the state courts providing that a jury is waived unless demand is made, does not govern in cases tried in the federal courts under the provisions of section 700.

Erkel v. U. S., 169 Fed. 623.

In *Ladd & Tilton Bank v. Lewis A. Hicks Co.*, 9th Cir., it is held that the statutes requiring that issues of fact in actions at law must be tried by a jury unless the jury be waived by stipulation in writing, when the facts may be tried by the court and its rulings reviewed as provided in section 700, are, so far as the right to review is concerned, jurisdictional, and in the absence of a compliance therewith, except the facts be admitted by the parties in a case stated, no question is open for review on errors other than "those arising upon the process, pleadings or judgment" (Citing Erkel v. U. S., 169 Fed. 623), and that where it appears from the record that no special findings were requested and no written stipulation waiving a jury appears from the records, this court is at liberty to consider only questions as to the sufficiency of the pleadings to sustain the judgment, it further appearing that the court had jurisdiction of the parties and the subject matter.

Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 Fed. 310.

In *Wear v. Imperial Window Glass Company*, 8th Cir., the case was tried by the court below without a jury and no request was made before the close of the

trial that the trial court find on special issues either of fact or law: Held:

> "But the case was tried by the court below without a jury and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, for any error of fact, and a finding of fact contrary to the weight of the evidence is an error of fact. (Rev. Statutes, par. 1011, U. S. Comp. St., par. 1672.) The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial." *Wear v. Imperial Window Glass Co.,* 244 Fed. 60, and cases cited therein.

> "Where a waiver of a jury trial is effected either by express oral consent or by personal at-

tendance upon the trial without objection, but without the filing of a written stipulation, rulings of the court upon the trial are not reviewable for such a submission to the decision of the court is not within the provisions of Rev. Stat., Secs. 649 and 700." Citing William Edwards Co. v. La Dow, 6th Cir., 230 Fed. 378.

"When the agreement waiving a jury is not in writing, the facts found cannot be noticed by the appellate court for any purpose." Rush v. Newman, 58 Fed. 158; Abraham v. Levy, 72 Fed. 124.

And

"The record must show that the stipulation in writing was made and the appellate court will scan the record closely to ascertain if the agreement referred to was in writing." Duncan v. Atchison etc., 9th Cir., 72 Fed. 808.

"A general finding upon a trial by the court without a jury has by the statute the same effect as the verdict of a jury. The parties are concluded upon the facts by the determination of the court, and nothing is presented for review except as might have been reviewed had there been a trial by jury," and "A general finding is conclusive upon all matters of fact precisely as the verdict of a jury." Streeter v. Chicago Sanitary Dist., 7th Cir., 123 Fed. 124.

And

"The review where the finding is general is limited to the sufficiency of the complaint and the ruling in the progress of the trial, if any be preserved, on questions of law."

> "Upon a general finding there is presented on appeal no question of the sufficiency of the facts found to support the judgment, and findings, whether they are general or special, have the effect of the verdict of a jury and are conclusive if there be any evidence to support them."

The foregoing principles are laid down in the hundreds of cases cited in the notes appearing on pages 213, 214 and 215, 6 Fed. St. Ann., 2d Ed., under section 700.

It is not urged as a ground for reversal in this case that there was no evidence to sustain the judgment, and even if this were true, where the case is submitted to the trial court without stipulation in writing waiving a jury, if plaintiff in error desired to raise any question of law upon the merits, in the court above, he should have requested special findings of fact by the court, framed like a special verdict of a jury, and then reserved his exceptions to those findings if he deemed them not to be sustained by any evidence. In this way, and in this way only, is it possible to review completely the action of the court below upon the merits. Humphreys v. Cincinnati Third National Bank, 6th Cir., 75 Fed. 852; Fales v. New York Life Insurance Company, 6th Cir., 98 Fed. 234; Phoenix Security Co. v. Dittinger, 9th Cir., 224 Fed. 892, 6 Fed. St. Ann., 2d Ed., pp. 221 and 222.

Motion for judgment filed on May 21, 1924 [Tr. of R. p. 104], the case having been submitted to the trial judge on March 21, 1924 [Tr. of R. p. 95], not having been filed during the trial of the case, comes too

late and cannot be urged as a substitute for a request for special findings in that such motion was not presented during the trial, nor was the ruling thereon secured during the trial. Wear v. Imperial Window Glass Co., 224 Fed. 60, and cases cited on page 63.

Answering Brief of Defendant in Error Upon the Case Presented Other Than as Above Set Forth.

Statement of the Case.

Early in June, 1916, the county of Navajo, state of Arizona, invited bids or proposals from contractors, in accordance with their call for bids and preliminary specifications prepared by Charles E. Perkins, county engineer, covering the construction of certain bridges, for the payment of which bonds in the sum of sixty-three thousand dollars ($63,000) had been authorized and sold. [Tr. of R. pp. 65, 208, 216.]

Defendant in error, Louis F. Mesmer, an individual doing business under the name and style of Mesmer & Rice, in response to such invitation, submitted a bid for the construction of a bridge over the Little Colorado near Winslow, designated in such call Bridge T-3. [Tr. of R. p. 65.]

Subsequently, after the different bids had been examined by the county engineer, the contract for the construction of Bridge T-3 was awarded to Mesmer & Rice, upon the proposals, specifications and plans

submitted, for the flat price of twenty-three thousand eight hundred dollars ($23,800), this award being made August 7, 1916. [Tr. of R. p. 67.]

On September 5th, a contract was entered into between defendant in error and the board of supervisors of Navajo county, containing the plans, specifications and proposal of Mesmer & Rice. [Tr. of R. pp. 6, 74.]

On or about August 9th, Mesmer learned that the Federal Government intended to contribute fifteen thousand dollars ($15,000) for the construction of the Winslow bridge. Until this time, it was understood that the bridge would be built in accordance with the specifications prepared by Charles E. Perkins, and upon which the plans were made and the bid of twenty-three thousand eight hundred dollars ($23,800) was based. The fifteen thousand dollars ($15,000), however, was available to the county only upon condition that the plans and specifications would meet with the approval of the Indian Department, and it became evident that there would necessarily be a change in the plans, particularly with regard to the substructure. [Tr. of R. p. 76.]

The award having been made, and it not being known at that time either to the county engineer, the board of supervisors or defendant in error, what changes might necessarily be made, and it being deemed inexpedient to re-advertise for bids, and it being also necessary that the plans should be changed, the county engineer, acting, as the evidence shows, by authority, and under the instructions of the board

of supervisors, and after consultation with the state engineer, prepared new plans, involving increased amounts and weights of structural and reinforcing steel, of excavation, of a much greater depth in the sinking of the piling, and a large amount of necessary extra concrete, to say nothing of extra labor. [Tr. of R. pp. 140, 170, 173, 174.]

With the knowledge that these changes would involve increased expense, and also, as before stated, with the knowledge that additional changes might be required to be made by the Indian Department, it was agreed that all changes necessitated through the modification of the original plans upon which the bid of Mesmer & Rice was submitted, and as incorporated in the contract of September 5th, should be paid for under the addenda for extras clause, incorporated in the original bid, which clause provided that:

Additional concrete in place should be paid for at the rate of $20.00 per yard.

Additional structural steel in place should be paid for at the rate of 7.5¢ per lb.

Additional reinforcing steel in place should be paid for at the rate of 7¢ per lb., and

All other work on a percentage basis, at actual cost, plus fifteen (15) per cent. [Tr. of R. pp. 140-166.]

After the work was commenced, estimates were made for payments due, and during the month of May, 1917, there arose for the first time a difference of opinion between Mesmer and the board of super-

visors, it being contended by the board that all extra work required by the modifications of the county engineer were included in the original price of twenty-three thousand eight hundred dollars ($23,800), and defendant in error contended that this extra work was to be paid for at the unit price, as per the addenda for extras included in the original proposal, specifications and plans, and as referred to in the contract. [Tr. of R. p. 136.]

In reliance upon his contract as understood by him, Mesmer nevertheless continued work upon the bridge, and in the month of November, 1917, presented to the board of supervisors a demand for the payment of seventeen thousand seven hundred and seventy-six dollars ($17,776), claimed to be due on the contract, and based upon charges made for extra work and material used in the construction of the bridge under the changed plans. The demand of November 5th being identified as Plaintiff's Exhibit 10.

On this date, the board of supervisors rejected the claim and there succeeded between that date and December 3rd following, a series of conferences between the board and Mesmer and his representative, which resulted in a meeting being held on December 3rd, at which time, throughout the whole day, the action of the board upon the demand of November 5th was the sole topic of discussion. The result was that the board admitted its liability for certain work performed at the request of the Commissioner of Indian Affairs, and its liability for payment of those items of the demand at the unit price, as per addenda for

extras mentioned in the contract, and in addition thereto, an amount sufficient to bring the total payments up to twenty-three thousand eight hundred dollars ($23,800).

It being apparent that no further sum would be allowed upon the November claim, Mesmer accepted the partial sum allowed, to-wit, the sum of six thousand two hundred four dollars and 62/100 ($6,204.62) as alleged, with the knowledge on the part of plaintiff in error that he was dissatisfied with such allowance, and with the reservation on his part of his right to sue for the further sum of fourteen thousand one hundred ninety-five dollars and 38/100 ($14,195.38), being the balance due him under and by the terms of the contract. [Tr. of R. pp. 140, 167.]

Upon consideration of the motions and demurrers interposed to the bill in equity, filed for the purpose of reforming the contract, this court remanded the suit to the law side of the court. The complaint was modified so as to meet the requirements of pleading on the law side. Demurrers and motions having been interposed, an amended complaint in law was thereafter filed, to which no demurrer or motion was interposed, and the issues in this suit were tried upon the amended complaint and the substitution for paragraphs 6 and 8 in the amended complaint of paragraphs designed to conform to the evidence adduced at the trial.

It is the contention of plaintiff that the action of the board of supervisors at the December meeting was to all intents and purposes a reconsideration of

its action in disallowing the November demand, at the November meeting, lacking only a minute entry made that the claim of November 5th was then being reconsidered, and that suit brought on May 31st was, and is, within the six months' limitation for this purpose as provided in section 2439, Revised Statutes of Arizona, 1913.

Argument on Authorities.

The sufficiency of the evidence to support the findings of fact not being involved in this appeal, it follows that the trial court has found in favor of defendant in error upon all of the facts contained in the foregoing statement, and there remains to be discussed, in the event this court shall entertain jurisdiction to examine any questions of law other than the sufficiency of the complaint and the regularity of the process, only the construction of the law applicable to the undisputed facts. For the convenience of this court there follows the paragraphs of the Revised Statutes of Arizona which bear upon the statutory questions of law involved:

PARAGRAPH 2434:

> "Every person having a claim against any county in this state, excepting those referred to in the provisions of this section, shall, within six months after the last item of the account accrues, present a demand therefor, in writing, to the board of supervisors of the county against which such claim or demand is held, verified by the affidavit of himself or agent, stating minutely what the claim is for, and specifying each sev-

eral item and the date and amount thereof; provided, that the board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued; that nothing herein shall be held to applv to the claims for compensation due to jurors and witnesses, and for official salaries, which, by some express provision of law, is made a demand against the county."

PARAGRAPH 2435:

"No account shall be passed upon by the board unless made out as prescribed in the preceding section, and filed by the clerk at least one day prior to the session at which it is asked to be heard. All accounts so filed shall be considered and passed upon at the next regular session after the same are presented, unless for good cause the board shall postpone the same to a future meeting."

PARAGRAPH 2439:

"A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after final action of the board, but not afterward, and if in such action judgment is recovered for more than the board allowed, on presentation of the judgment, the board must allow and pay the same, together with the costs adjudged, but if no more is re-

covered than by the board allowed, the board must pay the claimant no more than was originally allowed. A claimant dissatisfied with the amount allowed him on his account may accept the amount allowed, and sue for the balance of his claim, and such suit shall not be barred by the acceptance of the amount allowed."

It is in evidence that insofar as the demand of November 5th is concerned, it was filed within six months from the completion of the last work upon the bridge.

It is found as a question of fact, that the board of supervisors, at the meeting of December 3rd, reconsidered the claim and demand theretofore, on November 5th, filed with the board, so that the provisions of paragraph 2435 need not, we believe, be considered in connection with any of the controverted issues involved.

It is also found as a matter of fact, that the final action upon the demand of November 5th was taken by the board on December 3rd, 1917. Suit was filed on May 31st, 1918, and so within six months after such final action by the board of supervisors as required under the provisions of paragraph 2439, Revised Statutes of Arizona.

If the Demand Against Navajo County Is of a Character Requiring Itemization, and if the Demand Lacks Sufficient Itemization, the Board of Supervisors Has No Jurisdiction to Allow the Sum Claimed.

In Corpus Juris, Counties, paragraph 370, it is said:

> "The authorities are not in accord as to the effect of a decision of the county board, allowing or disallowing a claim against the county, especially as to the effect of such decision on other remedies for collection. In some jurisdictions it is held that the county board in passing on claims against the county, does not necessarily act in a judicial, but merely in an executive or ministerial capacity, as agents of the county, and that allowance of the claim, while *prima facie* evidence of its correctness, will not constitute an adjudication binding on the county." Citing Alabama, Indiana, Kansas, Missouri, North Carolina, Virginia, and West Virginia. "The weight of authority, however, is to the effect that a board of county commissioners, in the audit, adjustment, allowance or disallowance of a claim against the county, exercises judicial functions, and having exclusive jurisdiction, its judgment in the absence of fraud, is conclusive both on the board and on the parties interested, unless appealed from or reversed in the mode prescribed by law. * * * Under none of the cases holding as above cited, has it ever been held that the action of the board is final where the board allows claims illegal on their face or otherwise exceeds its jurisdiction. Corpus Juris, p. 370, cases cited."

The Claim or Demand Is Not Such a Demand as Requires Itemization.

The brief of plaintiff in error proceeds upon the assumption not only that the particular items going into the construction of the bridge should be set forth in detail, but that even if such items were so set forth, they could not be allowed and paid for as extras, because it does not appear that any of such so-called extras were ordered after the commencement of the construction work, and attempts to support the argument by insisting upon the inclusion of the words of the contract and proposal referring to the addenda, which reads:

"If after construction has started it becomes apparent that additional quantities are required, we hereby propose to furnish," etc.

Whatever may be said and whatever cases may be cited in support of the attempt on the part of plaintiff in error to prevent defendant in error from recovering upon the demand where every equitable consideration pleads for him, we believe the final determination of this question rests not upon the sufficiency of the itemization, but upon the question as to whether or not this demand is a claim which under the statute requires itemization. If this contract had been completed and accepted under the original proposal, plans and specifications or originally drafted at a flat or unit price of $23,800, upon which all except the sum of $6204.62 had been paid, and the demand on December 3rd had been presented for this amount

without reservation or exception and in full accord and satisfaction of all moneys then due, it would not, we confidently say, have been asserted by the board of supervisors that the items making up this amount should have been minutely set forth in the demand. Indeed, this is admitted by plaintiff in error through the payment by the board of supervisors of the sum of $6204.96, no part of the items making up this amount having ever been requested or even suggested by the board of supervisors. It is apparent that if this sum was paid as a portion of the total sum of $23,800, admitted to be due under the contract as construed by plaintiff in error, and if it is also claimed that this is a contract requiring itemization in order that the board of supervisors shall have jurisdiction to act upon its allowance, then the allowance of $6204.96 without itemization was an act in excess of its jurisdiction.

If the contract requires itemization as to those parts in excess of $23,800, the requirement is equally imperative that the items comprising the work up to this amount should be minutely set forth.

The board of supervisors contracted to pay defendant in error a fixed sum of money, that is to say, $23,800.00, for work performed under the original specifications. It is found by the trial court as a fact that the board of supervisors, through its county engineer, in collaboration with the contractor, and for the purpose of anticipating the requirements of the United States Indian Department, which requirements were on the 9th day of August, 1917, unknown, in-

creased the weight and thickness of steel cylinders, the yardage and cement foundation, the depth and strength of piles and other material changes in the substructure, which changes were agreed to be paid for at the unit prices covering extras as set forth in the original proposal and specifications. It is found as a fact, also, that even on August 9th, with the changes agreed to, it was not then known that additional changes would not be thereafter made necessary. The result was that the fixed sum of money originally agreed to be paid to the contractor was increased in a further fixed amount based upon known and determined weights, thickness and quantity of material to be used, all of which were to be paid for at a fixed and known price. It became and was a simple matter of computation and the amount involved was as well known at the time the new plans were agreed upon as at the time the structure was completed under the new plans. The contractor could not have charged for any more in weight or quantity than was required by these changes unless, indeed, additional changes had been authorized and required by the county at the suggestion or demand of its engineers or the engineers of the Indian Department. It was not a matter of computation as to the final aggregate amount of the weights and materials used, but only the computation as to what portion of the extra material and weights had been completed during each month, that is to say, there was substituted for the flat contract price of $23,800.00, a further contract price of materials agreed and understood to be

used, at the same unit prices as if the contract had been entered upon on the original specifications for $23,800.00, added to which there should have been required extras to be paid for under the terms of the proposal, the specifications and the contract itself at agreed and determined unit prices. The function of the board of supervisors in the making of any partial or final payments was confined to an ascertainment each month of what proportion of the work agreed to be performed had been completed and allowance on that part of the work completed based upon the contract price, plus such portion of the work as was agreed to be paid for as extras at the unit prices upon which such extras were agreed to be paid.

It is indeed a forced construction of the phrasing of this contract which permits plaintiff in error to argue that because no other additions were required by the Indian Department subsequent to those provided for prior to September 5th, the contractor should not be paid for those extras required before that date, but subsequent to the acceptance of the proposal, when the contract itself recites not only that the substructure was to be paid for at unit prices fixed for extras, but that all other extras thereafter ordered should be paid for on the same unit price basis.

It is a fact necessarily by the trial court found to have been proven that the amount for which claim was presented for allowance of November 5th, 1917, and the claim included in the demand presented on that day, and the action of the board taken on November 5th, was on December 3rd the sole topic of dis-

cussion between the contractor and the board of supervisors. The result of this discussion was that the amount of $6204.62, being a portion of the amount included in the November demand, was allowed, and for the purposes of this allowance a separate demand was required to be made out and filed. It is found that final action of the board of supervisors on the November demand was taken on December 3rd. This being determined as a fact, the plea in bar and of the Statute of Limitations was necessarily denied, the suit having been filed within six months from final action of the board of supervisors so had on December 3rd.

Authorities.

THIS IS NOT SUCH A DEMAND AS REQUIRES ITEMIZATION.

If the demand is based upon the contract substituting for the flat amount of $23,800.00 another fixed amount determinable by computation of the weight of extra steel used and the yardage of concrete filling, and if these weights and this yardage were known and agreed upon by both parties before the construction under the contract was commenced, as is the fact in this case, then such added and known amounts of money would be due under the contract itself and could be computed as easily by the engineer for the county, whose duty the evidence shows was to make such computations, as by the contractor himself. In other words, if a certain amount of money shall be due upon a contract, whether represented by an unpaid balance of the fixed amount or by an unpaid balance

of an equally fixed amount based upon the amount of additional steel and concrete used at fixed prices, the result is the same as to the obligation of the county to pay the agreed amount. This principle has been laid down and found support in the following cases:

In re Board of County Commissioners, Minn. 177 N. W. 1013.

Upon the facts stated, the county board had resolved to issue bonds to refund the floating indebtedness. One Meyers proposed to act as the agent of the county, in preparing and marketing the bonds, and in bearing certain further, other expenses connected therewith. As compensation for his services, he was to receive one-half of one per cent yearly, on the face of the bonds actually issued, not to exceed the sum of five thousand dollars ($5,000). A contract was entered into along these lines and suit being brought to recover, it was held:

> "Where a demand against the county is founded on an express contract for the payment of a fixed sum as compensation for services rendered, the county board has no discretion to exercise, but must allow and pay the stipulated compensation if the services have been performed. (Citing Werz v. County of Wright, Minn., 131 N. W. 635.) Myers presented a verified claim against the county, as provided by section 760, General Statutes, 1913, based on his contract with the county. It was not necessary to itemize it or set forth in detail his expenditures in performing the contract. If it was valid, he was entitled to the whole of the agreed compensation."

In the case at issue, there is, of course, no question of the right of the County of Navajo to enter into this contract.

In Merz v. Wright County, above cited, Minn., 131 N. W. 635, it is held:

> "The certificate of the engineer that the work had been completed and the contract performed, presented to the commissioners for approval, is not a claim within the meaning of that statute. The contractor's right to payment is founded upon the contract entered into with the county auditor, and the amount thereof is determined thereby, and by the number of yards of excavation, a matter of mathematical computation. The right of the contractor to compensation is in no manner within the control of the commissioners. That is determined by the contract, which the board cannot repudiate. The whole duty of the board, in this connection, is to determine, then, whether the contract has been performed, and perhaps, whether the certified yards of excavation is correct, if payment is by the contract, governed thereby."

This case is, we think, particularly applicable to the facts in the case at issue, in that the board of supervisors, as well as the Indian Department, had its supervising engineer in constant charge of, and inspecting the work as it progressed.

The county knew, from the original plans, the extent of the work originally contemplated. It knew the amount of extra work required by the Perkins plans. It knew the thickness of steel, increased as it was

from that in the original plans. It knew the extent of extra reinforcing steel, and the extra excavation and yards of concrete work. It knew the price at which all of this extra work and materials were to be furnished.

It even knew, as is in evidence, that portion of the extra work to be charged for at the agreed price, not only as allowed and paid for by the board of supervisors on December 3rd, but in the further sum of $1307.00. Indeed, the computation had already been made, and there remained for the board of supervisors only to allow that portion of the sum of $17,776 which had not theretofore been allowed, and paid.

In Quigg v. Monroe County, Wis., 113 N. W. 723, the following claim was presented for allowance:

> "The County of Monroe to C. E. Quigg, M. D., debtor:
>
> Nov. 21-22, 1905: To post mortem of the body of James De Corah, opening of abdominal thoracic and cranial cavities, also removing the cervical vertebrae from the body and preparing same for examination by order of the jurors and assistant district attorney.....$50.00"

Upon this claim an allowance was made of $10.00. From the decision of the board of supervisors an appeal was prosecuted. It was held that every claim or demand is not an account, although every account is a claim, and that the claim in question so presented was not such a claim as under the statute required to be itemized. More especially would this be

true if, as in the case at bar, the fee for post mortem examinations had by contract been fixed at the sum of $50.00.

See, also:

Bayne v. Board of Supervisors, Minn., 95 N. W. 456.

In this case a contract was let by the county for the construction of three bridges at the price of $1200.00. Upon completion of the bridges the contractor made his demand for payment of this sum as per the contract and his demand was verified under statute in all substantial respects similar to the statute of Arizona. Objection was raised to the payment upon the grounds, first, that the demand was not properly itemized; second, that it was such a contract as the board was without jurisdiction to enter into. The court held that where a fixed and determined price was agreed to be paid upon the completion of work, it would be futile and absolutely unnecessary to itemize the claim; that the board was concerned only in determining whether the contract had been fully completed; that such demand was a substantial, if not literal, compliance with the requirements of the statute. It was further held in this case as to the plea of lack of authority on the part of the board of supervisors to enter into such contract because for an amount in excess of that for which work could be contracted without calling for bids, that the authority of the board must be presumed, and this question being raised neither by the

pleadings nor the brief, it would not be considered on appeal.

The latter part of the opinion is applicable to the argument made in the brief by the plaintiff in error that the board of supervisors of Navajo county was without power or jurisdiction to act upon the November claim at its December meeting.

Further, upon the authority of the board to act upon the November claim at the December meeting, plaintiff in error having urged that final action was taken upon the November claim on the 5th of November, and that the board was without jurisdiction to consider this claim at the December meeting, it is suggested that if plaintiff in error shall be consistently technical, in view of the provision of the statute that claims shall be filed at least one day before the meeting, and that such claims so filed shall be acted upon at the next regular meeting, the board of supervisors was without jurisdiction to act upon the November claim until the December meeting, for it appears from the record that the claim was filed on the day of the November meeting and not at least one day preceding and was not, if a strict technical construction shall be urged as to this provision, empowered to act upon the claim until the next succeeding meeting, which was in December.

Respectfully submitted,

GEORGE J. STONEMAN,
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1209 Broadway Arcade Building,
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NO. 4412

United States
Circuit Court of Appeals
For the Ninth Circuit

NAVAJO COUNTY,

Plaintiff in Error,

vs.

LOUIS F. MESMER, an Individual Doing Business Under the Name and Style of MESMER & RICE,

Defendant in Error.

Petition for Rehearing

Upon Writ of Error to the United States District Court of the District of Arizona

THORWALD LARSON,
County Attorney.

E. S. CLARK,
NEIL C. CLARK,
Attorneys for Plaintiff in Error.

Filed....., 1925.

.....
Clerk.

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

NAVAJO COUNTY, PLAINTIFF IN ERROR, -v- LOUIS F. MESMER, an individual, doing business under the firm name and style of MESMER & RICE, DEFENDANT IN ERROR.	NO. 4412

PETITION FOR REHEARING

Come now the appellant in the above entitled action, and respectfully moves for a rehearing herein upon the following grounds:

THE COURT FAILED TO CONSIDER THE INSUFFICIENCY OF THE COMPLAINT UPON THE QUESTION OF ULTRA VIRES.

It is evident from a reading of the opinion rendered by this Court on April 6, affirming the judgment below, that the most important point presented by appellant upon the oral argument, that of ultra vires, has inadvertently been omitted from the points considered. Perhaps this is due to the

failure of appellant's counsel to present the point as vigorously or as capably as its importance demanded. At any rate, the point so presented, to-wit: that the contract for extras, as pleaded in plaintiff's complaint, and which is the sole basis of the action, was **ultra vires.** This point was treated to some extent on pages 92 and following of our brief, but it could doubtless have been more forcefully presented, and doubtless ought to have been. It goes to the sufficiency of the pleading, and is expressly set up and relied upon in our Motion for Judgment (Tr. Rec. p. 104, line 5). Even if not included in the motion, it is our understanding that this Court may and should determine the sufficiency of the pleadings.

The complaint shows that "all payments are to be made from the bridge bond fund." (Tr. Rec. p. 71, line 3). It was, therefore, known to plaintiff and by all concerned, that the bridge in question was to be built from the proceeds of bonds issued by the County, and that any material departure from the original plans and specifications must proceed in the statutory way; that is, by a readvertising for bids. Let us see what kind of an agreement the complaint charges the Board of Supervisors to have made, and whether such an agreement could legally have been made.

According to the amended complaint (Tr. Rec. p. 67), the Board of Supervisors, on August 7, 1916, accepted the bid of plaintiff, made in response to

an advertised call (Tr. Rec. 63) to build a certain bridge for $23,800. The contract itself was signed September 5, 1916. Paragraphs IV and V of the Amended Complaint read as follows:

"* * * That on or about the 9th day of August, 1916, plaintiff was informed by C. E. Perkins, the then County Engineer of defendant, acting in its behalf by and with authority of the Board of Supervisors of said defendant, that there would be available for the construction of said bridge the sum of fifteen thousand ($15,000.00) dollars, being a portion of the amount appropriated by the Indian Department of the Federal Government, provided that certain changes should be made in the specifications theretofore by plaintiff submitted, so that said construction should fulfill the requirements of the Indian Service; that said requirements were not at said time known, either to plaintiff or defendant, and for this reason it was agreed and understood between plaintiff and the said C. E. Perkins, and also by the Board of Supervisors of said defendant, that the changes in the construction and specifications which might be required to be made in order to fulfill the requirements of the Indian Service should be paid for as extras at the rates and prices provided for in the addenda both to the specifications and the contract; that from time to time subsequent to the 5th day of December, 1916, and during and including the time up to the completion of said bridge changes so required were made with the knowledge of defendant, acting through its County Engineer and its

Board of Supervisors, and that such changes and alterations consisted of the use of additional material; in the thickness of the steel cylinders, and also in the top and bottom chords and in the lower lateral bracing, all of which necessitated the use of materials and labor as hereinafter in this complaint set forth, and all of which plaintiff alleges it was understood and agreed should be paid for as extras.

"Plaintiff alleges that changes hereinbefore required to be made in the original plans and specifications, which prior to the 9th day of August, 1916, had been submitted by plaintiff and accepted by defendant, were agreed to be made on and subsequent to the 9th day of August, 1916; * * * * * that plaintiff, relying upon the understanding and agreement so had with defendant, both as set forth in said written contract and as understood and agreed between plaintiff and defendant, its officers and agents, on or about the 9th day of August, 1916 completed said bridge in compliance in all respects with its contract and agreement, at an expense to him over and above the original contract price of $23,800.00 of the sum of $13,973.65, which sum plaintiff alleges became and was a necessary expenditure by reason of the changes directed by defendant as aforesaid in the construction of said bridge with superstructure and approaches in a manner so as to comply with the requirements of the Indian Service, and make available to defendant the appropriation by the Federal Government of the sum of $15,000.00; * * * * *"

It is thus plain that the Board, after accepting the bid of plaintiff for a certain bridge at a cer-

tain figure, undertook to contract for a very different bridge, at an increased cost of nearly 60%, and without readvertising or affording any opportunity for competitive bidding. On the face of the complaint itself, this does not present the ordinary arrangement for "extras," which in any case do not amount to an appreciative percentage of the contract price. This was an agreement for practically a new bridge throughout. It is plainly shown in Par. VII (Tr. Rec. 78) that conferences extending over a period of four months after August 9, 1916, were had between the interested parties for the very purpose of determining "what changes and alterations from the original plans and specifications submitted by plaintiff would be necessary to meet the requirements of the Indian Department." This is a frank and unequivocal assertion that a new contract was made. In paragraph IV it is stated that the requirements of the Indian Department were not then known either to plaintiff or defendant. That is to say, the Board was not only contracting for a different bridge than that upon which it had advertised for bids, but was contracting blindly, for anything the Indian Department might require, without bids, competition or authority. This the Board could not and cannot do.

It is a familiar rule that the law relating to a contract is a part of the contract itself.

"The law of the place where the contract is

entered into at the time of the making of the same is as much a part of the contract as though it were expressed or referred to therein."

13 C. J. 560, Par. (523)—3.

The plaintiff was bound to inform himself, and from the foregoing, it is fairly reasonable to suppose that he had informed himself as to the power or lack of power of the Board of Supervisors, after having accepted a bid for a particular type of bridge, to increase the expenditure for said bridge to an amount more than $13,000.00, without competitive bidding. It was the duty of the contractor to inform himself that the statutes of Arizona provide, among other things, that the Board of Supervisors may not purchase materials in excess of $100.00 valuation without advertisement and competitive bidding; that he inform himself of the provisions of Paragraph 2431 of the Civil code of Arizona to this effect:

"The Board must not for any purpose contract debts or liabilities except in pursuance of law or ordinances of its own adopting, in accordance with the powers herein conferred."

"A contractor dealing with a municipal corporation is chargeable with knowledge of the limitations on the power of its agents and officers."

Contra Costa Construction Company vs. Daly City, 192 Pac. 178.

"A person contracting with public officers must take notice of their powers and is charged with a knowledge of the law, and makes a contract in violation of the law at his own risk, and where public officers fail to advertise and contract with the lowest bidder, a contract so made is wholly void and imposes no obligation upon the public body."

Reese vs. Ultra Vires, Paragraph 190

"The plaintiff is chargeable with knowledge that the Fire Commissioners in employing him, had no authority to bind the defendant, and the City cannot be held liable for the services rendered even if beneficial to it."

Douglas vs. Lowell, 194 Mass. 268; 80 N. E. 510;

Higginson vs. Fall River, 226 Mass. 423; ; 115 N. E. 764; 2 A. L. R. 1211;

In the case of City of Chicago vs. Mohr, the contractor Mohr was permitted to alter his bid, such bid having been submitted after due advertisement and submission of bids in competition with other bidders. The Supreme Court of Illionis said:

"It is a clear violation of the law to permit the change in the bid of the Freeman Company as to the matter of time. That it is obvious to allow the change of the bid in any material respect after the bids are opened is a clear violation of the purpose, intent and spirit of the law, and opens the door for preferences and favoritism as between the different bidders, if not to the grossest frauds. When a

bid is permitted to be changed it is no longer the sealed bid submitted in the first instance, and to say the least is favoritism if not a fraud, a direct violation of the law and cannot be too strongly condemned."

In the case of Ely vs. Grand Rapids, 44 N. W. 447, a change in the contract was attempted by the City Council of Grand Rapids after having entered into a contract with one Ely for the construction of a certain amount of paving, by permitting the contractor Ely to perform an additional amount of paving at the same rate as the original contract. Of this the court said:

"It is true that the paving of gutters was within the scope of improvement, but this didn't confer upon the defendant the right to dispense with the charter requirements for competitive bids."

Citing McBrien vs. Grand Rapids, 56 Mich. 95; 22 N. W. 206.

In Clinton Construction Company of California vs. Clay, 34 Cal. App. 525; 168 Pac. 588, the court held:

"A Board of Education cannot contract for work not provided for under original contract exceeding $500.00, without complying with section 130, requiring letting contracts to lowest bidder after public notice."

In L. R. A. (N. S.) vol. 38, p. 660, note 8, is the following:

"Generally public officers have no authority

to make or allow material or substantial changes in any of the terms of the proposed tract after the bids are in. Such a course would prevent real competition and lead to favoritism and fraud."

"The specifications cannot lawfully be altered after the bids have been made without a new advertisement giving all bidders an opportunity to bid under the new conditions. The municipal authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited."

And in such case, where the general public is affected by a violation of a particular statute, or the provisions of any public law, it is not necessarily essential to plead the illegality of a contract constituting such a violation.

Dunham vs. Hastings Pavement Co.,
67 N. Y. S. 632;

Kearns vs. New York, etc., Ferry Co.,
42 N. Y. S. 771;

Dealey vs. San Mateo Land Co.,
130 Pac. 1066-68;

Vol. 19 R. C. L. Par. 352 has the following:

"When a contract is entered into in violation of a positive rule of law intended for the protection of the taxpayers, such as a requirement that contracts of a certain character shall be given to the lowest bidder, or that the incurrence of an obligation of a certain magnitude

shall have the approval of the voters of the municipality, there can be no recovery either upon the contract itself or upon a quantum meruit."

There was no statutory authority for the Board after awarding a contract upon competitive bidding for the building of a bridge at a stated price, to then contract for different construction of the same bridge without competitive bidding, under the guise of "extras." If it should be established in this case that the Board could make so improvident an arrangement, a dangerous power would be placed in its hands. If a Board can do what plaintiff seeks to enforce upon it in this case, it can let a contract for a $10,000.00 bridge, and then, under the subterfuge of "extras," make the same bridge cost $100,000.00.

There were, moreover, many statutory provisions in force in Arizona in 1916, which denied, expressly or impliedly, any such power. Boards of Supervisors exercise inferior and limited jurisdiction. They can do only those things which by express provision or necessary implication, they are permitted to do.

Hammer vs. Smith,
11 Ariz. 420.

County of Santa Cruz vs. Barnes,
9 Ariz. 42.

The Board of Supervisors of a county may make certain contracts for the county, but the county is

the contracting party, and the Board is the mere agency through which the county acts.

Gannon vs. Hohnsen,
14 Ariz. 523.

Where bonds are issued, as is the case here, the board can only proceed as provided by Paragraph 5282:

"If any bonds or other evidences of indebtedness shall be issued and sold by any county, school district, city, town, or other municipal corporation, under the provisions of this chapter, for the purpose of erecting and furnishing any public building within such county, school district, city, town or other municipal corporation, the board of supervisors, in event such public building shall be erected and furnished by the county or school district, and the city or town council in the event such public building is to be erected and furnished by a city, town or other municipal corporation, shall, within the period which it is required under the provisions of the preceding section of this chapter prepare and adopt a form of bond or other evidences of indebtedness, adopt plans and specifications for such building, and said board of supervisors, city or town council, as the case may be, shall, as soon as may be practicable after the adoption of such plans and specifications, advertise for bids for the erection and furnishing of said buildings.

"The notice of advertisement for such bids shall set a day and hour, not less than forty days from the date of such notice, when said

bids shall be received and opened, and said board of supervisors, city or town council, as the case may be, shall award the contract for the erection and furnishing or the erection or furnishing of said building to the lowest and best responsible bidder, provided that any and all bids so submitted may be rejected. In the event any bid shall be accepted, said board of supervisors, city or town council, as the case may be, shall require the person or persons to whom such award or contract has been let, to enter into a written contract with said board of supervisors, city or town council, as the case may be, for the erection and completion of said building and the furnishing thereof, and shall require such person or persons entering into such contract to give bonds to said county, city or town, for the amount of the contract, with two or more sufficient sureties, or give a surety company bond in a like manner, conditioned upon the faithful performance of the contract, such bond to be approved by the board of supervisors, city or town council, as the case may be."

While this paragraph does not expressly apply to bridges, it is made to do so by the proviso in Paragraph 5285, which is a part of the same chapter as Paragraph 5282.

If it be claimed that the county ratified the alleged agreement, then the authorities are practically universal that the board of supervisors could not ratify a contract which they had no right in

the first instance to make. This is a corrollary to the general proposition set forth above.

Such a contract cannot be ratified. 19 R. C. L. Paragraph 360 reads in part as follows:

> "It is clear that the attempted ratification by a municipal corporation of a contract which it has no power to enter into is ineffectual, and cannot render the contract a binding obligation."

We have confined ourselves in the foregoing discussion strictly to the allegations of the complaint. Taking it all to be true, it is wholly insufficient. The contract sued upon is upon the face of the complaint, a nullity.

II.

THE COMPLAINT DOES NOT SHOW THAT A LEGAL DEMAND WAS FILED AGAINST THE COUNTY.

The Court states the statutory law rather fully on the requirements of such a demand as will give a Board of Supervisors in Arizona jurisdiction, but entirely overlooks the fact that the complaint nowhere alleges that a proper or legal demand was filed; not even by way of legal conclusion. The only allegation respecting the substance of the statement rendered is found in Paragraph VI of the Amended Complaint, as follows:

"That upon completion of said bridge by plaintiff, on or about the 3d day of December, 1917, plaintiff presented to defendant, through its Board

of Supervisors, statement of the amount due him on account of labor and materials performed and (54) supplied for the construction of said bridge under the conditions hereinabove set forth, showing a balance due from defendant to plaintiff of the sum of $13,973.65."

Tested by any rule, this allegation is insufficient to give the court jurisdiction to enter judgment. It does not state that the statement was either itemized or verified. Considering that only such a demand as the complaint describes was filed, the Board was compelled to and properly did reject it.

In the substitute for Paragraph VI, (Tr. Rec. p 91) the same defects occur. We do not think these fatal omissions in the pleading can possibly have been cured or aided by the general finding of the court, although this is suggested in the last four lines of the opinion, as follows:

"With respect to the itemizing and dates and specifications of the demand, and account presented, the plaintiff in error is concluded by the general finding of the court."

We think the court must for the moment have overlooked the status of the pleading, and was thinking only of the effect of the general finding on issues of fact. We are the more assured of this upon reading the two cases cited in support of the ruling above quoted. Norris vs. Jackson, 9 Wall. 125, does not seem to involve the proposition stated by this court. It does, however, expressly hold

that where a general verdict has been returned, such questions as may arise on the sufficiency of the pleadings may be reviewed.

Nor does the case of City of Cleveland vs. Walsh Cons. Co., 279 Fed. 57, seem to support the holding of this court. It does hold that where there is no written waiver, the review is limited to the primary record. We are not urging a review of issues of fact. We are dwelling on the radical defects in the complaint. Taking it at its strongest, no demand, in legal effect, was ever presented.

A County Board of Supervisors is not bound, nor has it the right to allow a claim against the county, unless all the items of the claim are given.

Paragraph 2434, R. S. A. 1913;

Christie v. Sonoma County, 60 Cal. 164;

Gardner v. Newayago Co., 110 Mich.; 67 N. W. 1091;

Cochise County v. Willcox, 14 Ariz. 234-236-237.

Yavapai County v. O'Neill, 3 Ariz. 363;

Santa Cruz County v. McKnight, 20 Ariz. 103;

Phillips v. County of Graham, 17 Ariz. 208-212-213;

Atchison County v. Tomlinson, 9 Kan. 167;

Ontagamie County v. Town of Greenville, 77 Wis. 165; 45 N. W. 1090;

Uzzell v. Lunney, 104 Pac. 945;

In Cochise County v. Willcox, **supra,** (pp 237-40) the court said:

"The board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within six months after the last item of the account accrued, except as provided in Section 62 of this chapter. . . It follows necessarily that, if the board "must not hear or consider" a demand presented after the period of six months has passed, it has jurisdiction to make no order other than one of rejection or disallowance. In construing a similar statute, the Supreme Court of California said: "Section 40 of the County Government act of 1897 (Stats. 1897, p 470) provides that the Board of Supervisors must not allow any claim in favor of any person against the county unless upon a properly itemized and verified claim 'presented and filed with the Clerk of the Board within a year after the last item of the account or claim is accrued.' The claim of plaintiff was filed and presented more than a year after it accrued and hence the Board not only had no power, but was expressly prohibited from allowing it. It had no power to dispense with the express mandates of the statute. Citing:

Perrin v. Honeycutt,
144 Cal. 87, 77 Pac. 776,

Murphy v. Bondshu,
2 Cal. App. 249, 83 Pac. 278,
Carroll v. Siebenthaler,
37 Cal. 196,
Thoda v. Alameda County,
52 Cal. 350.

"If, therefore, the board cannot even 'hear or consider' a demand not presented within the prescribed period, the limitation in Section 989 (now 2434) is more than a "law of limitation to be made available only when specially pleaded;" it affects not only the remedy, but goes to the very right of the plaintiff to maintain any action whatever."

Clearly the Board has no jurisdiction over a claim unless itemized, and, not having jurisdiction, it can take no favorable action; much less waive the jurisdictional requirement. A Board of Supervisors is of inferior and limited jurisdiction, and nothing is presumed in support of its jurisdiction.

If a claim not properly itemized and verified should be allowed, the allowance is void, and subject to collateral attack.

State v. Goodwin (S. C.)
59 S. E. 35.

In the statement of facts made by the court, we find an error, doubtless due to clerical oversight, that we think should be corrected, as it might mislead the court upon a matter of some importance. At the top of page 2 of the opinion this statement is found:

"Plaintiff alleged that after commencing construction he was advised that $15,000 of an amount appropriated by the Indian Bureau of the United States government would be available, provided certain changes were made in the specifications therefore submitted by plaintiff," etc. The complaint, paragraph IV (Tr. Rec. 74), after alleging that the contract was signed Sept. 5, 1916, goes on to state "that on the 9th day of August, 1916, plaintiff was informed by C. E. Perkins, the then County Engineer of defendant, acting in its behalf by and with authority of the Board of Supervisors of said defendant, that there would be available," etc. The same statement in substance is found in paragraph VII (Tr. Rec. 78), which gives the date of commencing construction as Dec. 26, 1916; and after all changes, etc., had been agreed on. In other words, the Board and plaintiff knew, a month before the contract was signed, that there would be substantial changes in the specifications, owing to the requirements of the Indian Department, and that there would necessarily be an increased cost. Yet, according to the complaint, the Board, without giving any one a chance to bid on the new specifications, and certainly in defiance of the law, permitted the plaintiff to build under the new plan on the "extra" or unit basis. There might have been some justification, morally, though not legally, had the necessity arisen after construction had commenced, but under the circumstances pleaded by plaintiff, there was none.

It is stated in the opinion (page 4) that there was no motion for judgment upon the ground that there was no substantial evidence to sustain a judgment in favor of plaintiff. We beg leave to call the court's attention to the 1st, 2d, 3d and 6th paragraphs of our Motion for Judgment, filed in the trial court at the same time our trial brief was filed, and therefore during the trial, or at least before the case was submitted (Tr. Rec. 102-3). These paragraphs all go expressly to the point that both the pleading and the proof were insufficient to support a cause of action, and consequently insufficient to support a judgment, because of failure to allege or prove the filing of a legal demand, and because of allegation and proof to the effect that the agreement sued upon was ultra vires. If we take out of plaintiff's case the agreement and the claim he presented to the county for payment of what he claimed to be due under said agreement, there is nothing left to support anything. The pleading is so utterly defective as to take both of them out, and the motion for judgment certainly reaches them. It is in effect a demurrer to the evidence as well as to the complaint.

Finally, the circumstances of the case as developed by the pleadings of plaintiff, disclose a claim that is at least extraordinary, and certainly one that justifies careful scrutiny. We doubt if there is any recorded instance of a construction contract, upon which a claim was urged for extras amount-

ing to nearly 60 per cent of the original contract price. The mere statement of such a proposition is sufficient to arouse wonder.

In City of Cleveland vs. Walsh Construction Co., cited by this court in its opinion, Justice Denison says:

> "We are not dealing with a case where there is any suspicion of bad faith or over-reaching nor even where the excess developed above the amount of the certificate is so great as to dominate the original sum. The excess, both as to extras and as to units above the estimate, is relatively small, and is of the character normally incident to every such contract." (279 Fed. 66)

This, we think, emphasizes the illegality of the contract pleaded.

It is also obvious that several points have been overlooked in the development of defendant's case that would have had an important if not controlling bearing on the result. This situation, we ask the court to believe, is due entirely to counsel's unfamiliarity with the rules and procedure in Federal courts, and not to any intention of waiving the points. Because of these oversights the court is restricted to a review of the pleadings. With these circumstances in view, and because the opinion indicates that we failed upon oral argument to adequately present certain points that we have tried

to clarify in this motion, we respectfully offer this petition for a rehearing.

Respectfully submitted,

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Phoenix, Arizona,
May 2, 1925.

The undersigned, counsel for plaintiff in error herein, hereby certify that in their judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

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